Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

JURISDICTIONAL STATEMENT.

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IN THE

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OCTOBER TERM, 1975.

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No.

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC. AND DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

JURISDICTIONAL STATEMENT.

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OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:1I-9,

10) unconstitutional is not reported. The opinion of the Superior Court of New Jersey, Chancery Division, in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711. The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, – *N. J.* – (1975) in the within Jurisdictional Statement. Copies of all of the aforesaid opinions are collected in Appendices A-1, A-2 and A-3.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside the judgment of the New Jersey Supreme Court which upheld the constitutionality of *P. L.* 1973, *c.* 363. Said judgment was rendered on November 18, 1975, and entered on the same date. Thereafter, on December 11, 1975, the New Jersey Supreme Court remanded the matter to the Superior Court, Law Division, "for such further proceedings, if any, that that Court may deem appropriate . . ." (Appendix B, A55 *infra*). On December 19, 1975, the New Jersey Superior Court, Law Division, issued its order stating, in pertinent part, that ". . . no further proceedings are deemed appropriate by this Court . . ." (Appendix C, A57 *infra*). A notice of appeal to the Supreme Court of the United States was thereafter filed in the New Jersey Supreme Court on January 9, 1976 (Appendix D, A58 *infra*). The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct

appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3). Appellants believe the following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the New Jersey Supreme Court in this case:

> *Pike v. Bruce Church, Inc.*, 397 *U. S.* 137 (1970);
> *Huron Cement Co. v. Detroit*, 362 *U. S.* 440 (1960);
> *Dean Milk Co. v. Madison*, 340 *U. S.* 349 (1951);
> *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.* 673 (1930);
> *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S.* 229 (1911);
> *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877).

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

> No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the 'Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is solid and liquid waste, or the process of collecting, treating and disposing of same, a legitimate subject of interstate commerce?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place an undue burden upon interstate commerce?

3. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard, prior to the final determination, on the material issues of fact raised by their complaint?

STATEMENT OF THE CASE.

On January 2, 1974, *P. L.* 1973, *c.* 363, being

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

was approved by the Governor of the State of New Jersey, to become effective on February 1, 1974 (Appendix E, A61 *infra*).

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (Appendix F, A63 *infra*). Their simultaneous application for a temporary restraining order was supported by an affidavit of a licensed professional engineer (Appendix G, A86 *infra*) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

• • •

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> 4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to

> the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey." [1]

• • •

It was further supported by a copy of a letter dated December 26, 1973 from Richard W. DeKorte, Esq., Counsel to Governor William T. Cahill, to David Quient, Esq., city attorney of appellant City of Glen Cove (Appendix H, A89 *infra*), in which the Counsel to the Governor stated:

> "Also, I might add that Senate Bill No. 2367 (OCR) [*P. L.* 1973, *c.* 363] would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

Based upon the aforesaid documents, and additional affidavits which documented that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (Appendix I, A91 *infra*). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [2] (Appendix K, A98 *infra*). In granting

1. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been supported by appellees. See p. 9 *infra*.

2. *N. J. A. C.* 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."

A verbatim copy of the entire rule as same appears in the *New Jersey Administrative Code* is attached hereto as Appendix J, A94 *infra*.

interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (Appendix L, A100 *infra*), which averred, in pertinent part, as follows:

• • •

> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the

continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitious passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [*N. J. A. C.* 7:1-4]

• • •

. . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

• • •

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

• • •

. . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state

boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices."

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974.

On February 11, 1974, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co. and Continental Vanguard, Inc. were granted leave to intervene.

Thereafter on February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that the principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State. They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (Appendix M, A106 *infra*).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (Appendix N, A114 *infra*), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[3] He also revealed that no effort had been

3. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust, (b)

made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (Appendix O, A195 *infra*).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (Appendix P, A204 *infra*). Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (Appendix Q, A206 *infra*), that summary judgment not be granted to appellants pending a hearing on the merits:

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.*
>
> • • •
>
> Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of

3. (Cont'd.)
odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

> New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (Appendix A-1, A1 *infra*) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminated against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (Appendix R, A207 *infra*), by which they appealed from the trial court's grant of summary judgment to appellants.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (Appendix S, A209 *infra*). Said motion was denied by the Court on August 14, 1974 (Appendix T, A211 *infra*).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal

was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[4] by order dated October 7, 1974 (Appendix U, A213 *infra*). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (Appendix A-3, A27 *et* seq., *infra*).

By its ruling, the New Jersey Supreme Court adopted a novel and unprecedented procedural approach: it disposed, on its merits, of a case involving substantial disputed issues of material fact which had never been heard

4. In *Hackensack Meadowlands*, suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

by the trial court.[5] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants emergent motion for a stay of judgment and interim injunctive relief pending its further order (Appendix V, A215 *infra*).

In an effort to cure the substantive prejudice brought about by a fundamental departure from established rules of procedure, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (Appendix W, A217 *infra*). The trial court reported that it could hold a plenary hearing within two weeks. In the alternative, appellants sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

5. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception, were not part of the record presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the Rules of Court, appellants understood that the case would be remanded for a hearing on the merits if an appellate court reversed the order of the trial court granting summary judgment.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the emergency stay that it had previously issued, effective December 31, 1975, and further

> "ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> ORDERED that this Court does not retain jurisdiction."

(Appendix X, A224 *infra*).

Based upon this order, appellants and intervenors were compelled, as a practical matter, to dismiss with prejudice every count in their respective complaints which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (Appendix C, A56, *infra*), the trial court

> "FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975 (Appendix Y, A225 *infra*).

THE QUESTIONS ARE SUBSTANTIAL.

A. Solid and Liquid Waste, and the Process of Collecting, Treating and Disposing of Same, Is a Legitimate Subject of Interstate Commerce.

Solid and liquid waste disposal presents questions that are national in scope and consequence.[6] It is now established that the disposal in one state of solid waste collected in another state constitutes an activity in interstate commerce.

In *United States v. Pennsylvania Refuse Removal Assn.*, 242 *F. Supp.* 794 (E. D. Pa. 1965), certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal." 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' argument that a worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of "trade or commerce" was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words "trade or commerce" as used in the Act*, United States v. Nat'l Ass'n of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n.*, 242 *F. Supp.*, *supra*, at 700. (Emphasis added).

6. See pp. 38-41 *infra*.

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F.* 2d 806, 808 (3rd Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).

Congress exercised its full power over interstate commerce in the Sherman Act, *U. S. v. Frankfort Distilleries*, 324 *U. S.* 293, 298 (1945), *U. S. v. Underwriters Ass'n.*, 322 *U. S.* 533, 558 (1844), *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 *F.* 2d 732, 739 (9th Cir. 1954). Therefore, if solid waste collection and disposal services in the flow of interstate commerce are viewed as trade or commerce for purposes of the Sherman Act, they also must constitute commerce within the meaning of the commerce clause, *U. S. Const.* Art. 1, Sec. 8, cl. 3.

While it is clear that the valuable service of removing and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is often a merchantable commodity. For example, a United States District Court has recently held that the movement of automobile hulks across state lines constitutes interstate commerce. *Alexandria Scrap Corporation v. Hughes*, 391 *F. Supp.* 46, 59 (Md. 1975). Auto bodies are specifically included within the definition "bulky waste" in the Rules of the Bureau of Solid Waste Management. *N. J. A. C.*

7:26-1.4.3. More importantly, in *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160, 170 (Ch. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, Judge (now Justice) Schreiber rejected appellees argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity." Solid waste often represents a cost efficient and environmentally sound method to recover severely mined or devastated lands, to produce gas for commercial purposes, and to create power generation by incineration (Appendix Z, A228-29, A230 *infra*).

This Court has frequently held that, in the absence of controlling federal legislation or implied federal preemption, a state may exercise its police power to prevent deception or fraud upon the public, *Plumley v. Massachusetts*, 155 *U. S.* 461 (1894), the prompt disposal of large animals not slaughtered for food, *Clason v. Indiana*, 306 *U.S.* 439 (1939), and the importation of unhealthy swine or cattle, *Asbell v. Kansas*, 209 *U. S.* 251 (1908); *Mintz v. Baldwin*, 289 *U. S.* 346 (1933), decayed or noxious foods, *Crossman v. Lurman*, 192 *U. S.* 189 (1904); *Savage v. Jones*, 225 *U. S.* 501 (1912), or immature citrus fruits, *Sligh v. Kirkwood*, 237 *U. S.* 52 (1915).

The evident purpose of such regulations is to prevent the spread of contagion or disease, to protect an unsuspecting purchaser from acquiring food which is unfit for human consumption and to prohibit deceptive and fraudulent practices. *Bowman v. Chicago &c. Ry. Co.*, 125 *U. S.* 465, 489 (1888); *Sligh v. Kirkwood*, 237 *U. S.* 52, 59-60 (1915); *Baldwin v. G. A. F. Seelig*, 294 *U. S.* 511, 525 (1935).

However, even in these cases, the particular regulation must be reasonable in its requirements and promote its objective without discrimination:

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food."
>
> *Savage v. Jones*, 225 *U. S.*, *supra*, at 525.

Appellees have never contended that either (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; or (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state. The aforesaid line of cases does not properly relate to the matter *sub judice*. If it did, then state or municipal governments, according to appellees' argument below, could adopt with impunity codes to prevent air, water or land pollution which directly discriminate against interstate commerce; a practice which has been unmistakably rejected by this and other Courts. *Savage v. Jones*, 225 *U. S.*, *supra*, at 525; *Huron Cement Co. v. Detroit*, 362 *U. S.* 440 (1960); *Proctor & Gamble Co. v. City of Chicago*, 509 *F.* 2d 69 (7th Cir. 1974), *cert.* den. 421 *U. S.* 978 (1975); *American Can Co. v. Oregon Liquor Control Commission*, 15 *Ore. App.* 618, 517 *P.* 2d 691 (Ct. App. Ore. 1973); *Bowie Inn, Inc. v. City of Bowie*, 274 *Md.* 230, 335 A. 2d 679, 688 (Ct. App. Md. 1975). Even the movement of air pollutants across a state line has been held to constitute interstate commerce, *United States v. Bishop Processing Company*, 287 *F. Supp.* 624 (Md. 1968).

The interstate transportation of solid and liquid waste for treatment and disposal certainly represents a legitimate, indeed a necessary and vital activity in interstate commerce.

B. P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ."

reveals that its sole intent and purpose is to impose an immediate, absolute, and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and disposal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not by that fact alone immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. Absent controlling federal legislation, the commerce clause does not deprive the states of the power to regulate matters of local public concern in those areas where uniformity of regulation is not necessary, as long as the exercise of the police power serves a real and legitimate purpose and does

not place an undue or excessive burden on or discriminate against interstate commerce.

The test has been stated most recently by this Court in *Pike v. Bruce Church, Inc.*, 397 *U. S.* 137, 142 (1970):

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows:
>
> *Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld* unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 *U. S.* 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally, the Court has candidly undertaken a balancing approach in resolving these issues. *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See e.g. *Schafer v. Farmers Grain Co., supra.*" (emphasis added)

Pursuant to the test announced in *Pike*, a balance will *not* be made between the burden imposed on interstate commerce, on the one hand, and the putative local benefits, on the other hand, unless the regulation (a) is evenhanded, (b) is based upon a legitimate local purpose, and (c) only

incidentally effects interstate commerce. If it is defective on any of these grounds, then the regulation must fall.

1. Evenhandedness.

A prohibition directed solely against solid or liquid waste which originates or is collected *outside* the State, and against the movement of such waste through New Jersey, is not evenhanded, and constitutes a discriminatory regulation of interstate commerce.

In the single paragraph of its opinion devoted to the discrimination issue, the New Jersey Supreme Court commented:

> "Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 475.

In *Dean Milk Co. v. Madison,* 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at

protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

> ". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance, where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The Court's responsibility in this area has been emphasized by Mr. Justice Reed in *Best & Co. v. Maxwell,* 311 *U. S.* 454, 455-456 (1940) where he commented:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

This responsibility has been undertaken conscientiously and with great care by the Court. In *Railroad Co. v. Husen,* 95 *U. S.* 465 (1877), the United States Supreme Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year. Commenting on the statute, the Court declared:

> "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they

> may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S., supra*, at 473.

As in the Railroad Co. case, *P. L.* 1973, *c.* 363 is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. See also *Best & Co. v. Maxwell*, 311 *U. S.* 454 (1940); *Head v. New Mexico Board*, 374 *U. S.* 424, 429 (1963).

In the leading environmental case, *Huron Cement Co. v. Detroit*, 362 *U. S.* 440, 448 (1960), an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement

Code of the City of Detroit. Finding that the ordinance applied equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> ". . . state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand. . . .
>
> "It has not been suggested that the local ordinance, applicable alike to 'any person, firm or corporation' within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. . . ." (emphasis added)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Even-handed local regulation* to effectuate a legitimate local public interest is valid unless pre-empted by federal action . . . , or unduly burdensome on maritime activities or interstate commerce . . . ."
>
> *Huron Cement Co. v. Detroit*, 362 *U. S. supra*, at 443 (citations omitted, emphasis added).

The Court, in *Huron*, stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. It is most significant, as

noted by the Supreme Judicial Court of Maine in *Portland Pipe Line Corp. v. Environmental Imp. Com'n*, 307 A. 2d 1, 40 (Sup. Jud. Ct. Me. 1973), that

> "*The Detroit ordinance* [in *Huron*] *did not discriminate against interstate commerce* and there was no showing that national uniformity was required to prevent inconsistent local regulations." (emphasis added)

Had the ordinance been discriminatory, it surely would have been struck down.

For example, if the City of Detroit had attempted to reduce air pollution and thereby promote the health and welfare of the city's inhabitants by prohibiting the discharge of smoke in the Port of Detroit by any steam-powered vessel shipping out of another port while permitting such discharge by local vessels, then the ordinance would certainly represent an unconstitutional discrimination against interstate commerce.

Similarly, if the State of New Jersey had attempted to reduce air pollution by prohibiting any person from driving a motor vehicle upon the roads of this state unless the vehicle was registered in New Jersey, there would be an unmistakable and intolerable discrimination against interstate commerce.

If there is a threat posed to the health, welfare and safety of the people of New Jersey or to the quality of its environment by the treatment or disposal of solid and liquid waste in accordance with regulations administered by the Department of Environmental Protection (a position which appellants do not believe can be factually supported), *then it is a threat attributable to the nature of the substance being regulated, and not to its place of origin.* Remedial measures based upon the exercise of the State's police power must be undertaken in an evenhanded manner. There can be no discrimination in favor of intrastate commerce and against interstate commerce.

If the disposal of solid or liquid waste should be limited or eliminated for reasons of public health, conservation, or environmental quality, then origin is not at all a relevant factor. In those areas where the potential for ecological harm is minimal or non-existent, there is no legitimate basis to single out and discriminate against solid and liquid waste collected in another state.

In an effort to support its decision, the New Jersey Supreme Court noted that:

> "Other state and federal courts in very recent years have not hesitated to sustain legislation having as its aim the protection of health and the maintenance of environmental values and natural resources against attacks based upon alleged violations of the Commerce Clause."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra* at 476,

citing the following cases to support its observation: *American Can Co. v. Oregon Liquor Control Commission*, 15 *Ore. App.* 618, 517 *P.* 2d 691 (Ct. App. Ore. 1973) (ban on non-returnable beverage containers); *Proctor & Gamble Co. v. City of Chicago*, 509 *F.* 2d 69 (7th Cir. 1974), *cert.* den. 421 *U. S.* 978 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Imp. Com'n*, 307 A. 2d 1 (Sup. Jud. Ct. Me. 1973), app. dis., 414 *U. S.* 1035 (1973) (prevention and control of marine oil spillage); *Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma*, 522 *F.* 2d 897 (9th Cir. 1975) (ban on further building).

Although the fact was neither expressed nor implied by the New Jersey Supreme Court, discriminatory treatment is entirely absent in each and every one of the

above-cited cases. Intrastate commerce is treated equally with interstate commerce.

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160 (Ch. 1974) the companion case to the case at bar, Judge (now Justice) Sidney Schreiber [7] struck down regulations adopted by the New Jersey Department of Environmental Protection and the Hackensack Meadowlands Development Commission which prohibited persons engaged in the collection of solid or liquid wastes which originated or were collected outside the State from disposing of same in the Hackensack Meadowlands District. In language equally pertinent to the present matter, Judge Schreiber observed:

> "DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that *it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious.* Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.
>
> Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be

7. Subsequent to his decision in the *Hackensack Meadowlands* case, Judge Schreiber was elevated to the New Jersey Supreme Court. The *Hackensack Meadowlands* case was appealed by the State and consolidated for oral argument with the within-captioned matter. Both cases were disposed of in the same opinion. Understandably, Justice Schreiber did not participate in the proceedings before the New Jersey Supreme Court. However, it is evident from his opinion in *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super, supra,* that a vigorous dissent would have been interposed if he had participated.

> accomplished by discrimination based on the source of the refuse."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super., supra,* at 174 (emphasis added).

A state cannot discriminate against interstate commerce under the guise of protecting the health of its citizens or its natural resources. The Court has a duty to determine for itself whether the regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce. *Asbell v. Kansas,* 209 *U. S.* 251, 256 (1908). The independent exercise of that duty is especially important because the power to determine the articles which may be the subject of commerce is, in effect, the controlling one. *Bowman v. Chicago &c. Railway Co.,* 125 *U. S.* 465 (1888).

In *Penna. v. West Virginia,* 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers."

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.,* 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal,

the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State,* and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." (emphasis added)

An identical position was expressed by Mr. Justice Cardozo in declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a lower price than the minimum prescribed by the New York statute. "The Constitution", commented Mr. Justice Cardozo, "was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig,* 294 *U.* S. 511, 523 (1935).

The parochial attitude identified by Mr. Justice Cardozo is equally evident in the within matter, and is calculated to lead to ruinous consequences on a national scale. There exists a substantial urgency compelling an immediate review of the constitutional validity of bans upon interstate solid and liquid waste disposal.

2. Legitimate Local Purpose.

The Rules of the Bureau of Solid Waste Management authorize the disposal[8] of solid waste in New Jersey through use of:

> "a. Sanitary landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.
>
> b. Incinerators constructed, operated and maintained in accordance with Regulations of the New Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.
>
> c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter."
>
> *N. J. A. C.* 7:26-2.1.2.

The prohibition imposed by *P. L.* 1973, *c.* 363 is not directed against treatment or disposal at all: it is directed against entry. The effect of the statute is to prevent every form of disposal, even those authorized and regulated by

8. The word "disposal" is defined in said Rules as: "the storage, treatment, utilization, processing, or final disposition of solid waste." N. J. A. C. 7:26-1.4.20. The word "treatment" is not defined.

the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq*.

In deciding the case at bar, the New Jersey Supreme Court identified land preservation as the purpose supporting an exercise of the State's police power:

> ". . . extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 472.

No other form of disposal was mentioned by the New Jersey Supreme Court as support for the enactment of *P. L.* 1973, *c.* 363.

Although a state has a responsibility to protect its people and their property, it is well-established that a police regulation which affects interstate commerce must not go beyond the necessities of the particular case. *Reid v. Colorado,* 187 *U. S.* 137, 151 (1902); *Smith v. St. Louis and Southwestern Ry. Co.,* 181 *U. S.* 248, 256 (1901).

If the purpose as found by the New Jersey Supreme Court, of *P. L.* 1973, *c.* 363 was to preserve land, then there was no basis to prohibit (a) entry, and (b) other authorized and regulated forms of disposal. The statute went far beyond what was reasonable and necessary in order to accomplish its purpose.

It is interesting that "garbage to be fed to swine in the State of New Jersey" is excepted from the prohibition imposed by *P. L.* 1973, *c.* 363. The word "garbage" is not synonymous or co-extensive with, but is narrower than, the term "solid waste". It is a word of art, separately defined in New Jersey as:

> ". . . all *putrescible* animal and vegetable wastes resulting from the handling, preparation, cooking, and consumption of . . . food . . . ."
>
> *N. J. A. C.* 12:100-2.1. (emphasis added)

Putrescible waste [9] has a greater potential for harm to the public health than bulky waste,[10] construction waste [11] or demolition waste.[12] Yet garbage to be fed to swine can freely enter New Jersey, while non-putrescible wastes and garbage intended for other purposes cannot.

P. L. 1973, *c.* 363 contains a Legislative finding

> ". . . that the public, health, safety, and welfare require that the treatment and disposal within this State of *all* wastes generated outside of the State be prohibited."
>
> *N. J. S. A.* 13:1I-9. (emphasis added)

Notwithstanding this finding, and in apparent inconsistency with it, the Commissioner of the Department of Environmental Protection is specifically empowered by

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9. *N. J. A. C.* 7:26-1.4.46—"Any waste liable to enter into a state of putrefaction, the typically anaerobic splitting of proteins by bacteria and fungi with the formation of foul-smelling, incompletely oxydized products."

10. *N. J. A. C.* 7:26-1.4.3—"Large items of solid waste which because of their size or weight requires handling other than normally used for municipal solid waste. Bulky waste includes but is not limited to such items as tree trunks, auto bodies, demolition or construction material, appliances, furniture, and drums."

11. *N. J. A. C.* 7:26-1.4.14—"Waste building material and refuse resulting from construction, remodeling, and repair operations on houses, commercial buildings, pavements, and other structures."

12. *N. J. A. C.* 7:26-1.4.17—"Waste generated from the razing of buildings, factories, and other man-made structures, including streets, roads, and fences."

the same statute to independently determine that the entry of solid and liquid waste collected in another state

> ". . . can be permitted without endangering the public health, safety and welfare . . . ,"
>
> *N. J. S. A.* 13:1I-10.

pursuant to regulations promulgated by the Commissioner permitting and regulating its treatment and disposal.

Sixteen days after the enactment of *P. L.* 1973, *c.* 363, and in accordance with the authority granted to him in said legislation, the Commissioner adopted *N. J. A. C.* 7:26-1.4 to become effective on the same date as the statute, February 1, 1974. Although said rule followed *P. L.* 1973, *c.* 363 in declaring a general prohibition against the entry into New Jersey of solid or liquid waste collected outside the State,

> "No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State,"

certain designated wastes including pesticides, hazardous waste and chemical waste entering the State solely for processing or treatment, were excepted from the generalized entry ban. *N. J. A. C.* 7:1-4.2. This action by the Commissioner was exceedingly significant for at least two reasons: (a) contrary to the legislative finding, it demonstrated that the public health, safety and welfare, in actuality, did *not* require that the entry of *all wastes* generated outside the State be prohibited, and (b) if substances noxiously designated "hazardous waste" could be carried into New Jersey *without further regulation of transportation*, then it follows that the *mere entry* of any

other less hazardous waste *does not* endanger the public health, safety and welfare.

The fact that the Commissioner *may* permit the entry of solid and liquid wastes which are otherwise prohibited by *P. L.* 1973, *c.* 363 does not legitimitize the statute in a constitutional sense. All out-of-state wastes are banned until the Commissioner affirmatively acts. The Commissioner is neither compelled to act nor to deal with solid and liquid wastes collected within the State on an equal basis with those collected outside the State. In fact, the regulations that were adopted by the Commissioner on an emergency basis, *N. J. A. C.* 7:1-4, perpetuate the discrimination evidenced by *P. L.* 1973, *c.* 363, and point out the manifest impropriety of the prohibition. Furthermore, the Commissioner may amend or repeal regulations with relative ease. And no explanation is offered as to why the methods of treatment and disposal permitted by *N. J. A. C.* 7:1-4 for out-of-state wastes are significantly more restrictive than the list of approved methods for solid waste disposal contained in the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* If the methods of disposal delineated in *N. J. A. C.* 7:26-1 *et seq.* ". . . can be permitted without endangering the public health, safety and welfare . . .," *N. J. S. A.* 13:1I-10, then they can be permitted for solid and liquid waste collected outside the State as well as for those wastes collected within the State.

The disposal of solid waste in accordance with presently existing laws and regulations and in conformance with sound engineering practices [13] does not present a serious threat to the health or environmental safety of

13. A design prepared by a professional licensed engineer must be submitted to and approved by the Bureau of Solid Waste Management as a condition precedent to the operation of any new sanitary landfill or the expansion of any existing facility. *N. J. A. C.* 7:26-2.2.3.

the community. Appellees have never, by affidavit, disputed this conclusion, which is generally accepted throughout the United States.

In *Horn v. Community Refuse Disposal, Inc.*, 186 *Neb.* 43, 180 *N. W.* 2d 691 (Sup. Ct. 1970), plaintiffs brought an action to enjoin the establishment and operation of a sanitary landfill. The court denied the application saying:

> "The evidence is persuasive that it is possible to operate a sanitary landfill so that it will not emit offensive odors, pollute ground waters, or be attractive to rodents. The rules and regulations adopted in 1969 enforcible by the State Department of Health under statutory authority are reasonably designed to produce that result."
>
> *Horn v. Community Refuse Disposal, Inc.*, 180 *N. W.* 2d, *supra*, at 692.

The overwhelmingly accepted rule is that incinerators and sanitary landfills which are properly maintained and operated are not public nuisances. *Wood v. Town of Wilton*, 156 *Conn.* 304, 240 *A.* 2d 904 (Sup. Ct. 1968); *Rocchi v. Zoning Bd. of App. of Town of Glastonbury*, 157 *Conn.* 106, 248 *A.* 2d 922 (Sup. Ct. 1968); *Myers v. City of Hagerstown*, 214 *Md.* 312, 135 *A.* 2d 147 (Ct. App. 1957) (and cases therein cited); Annotation, "Public Dump as Nuisance", 52 *ALR* 2d 1134.

All too often, the words "sanitary landfill" and "dump" are confused with one another. They are very different entities. The Rules of the Bureau of Solid Waste Management define a sanitary landfill as:

> "The land disposal site employing an engineered method of disposal of solid waste in a manner that minimizes environmental hazards, including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequent basis."
>
> *N. J. A. C.* 7:26-1.4.54

A dump, on the other hand, is separately defined as:

> "A land site at which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers."
>
> *N. J. A. C.* 7:26-1.4.23

When dumps were determined to be hazardous to human health, their operation was entirely prohibited in the State of New Jersey. *N. J. A. C.* 7:26-2.1.1. No distinction was made between waste collected within New Jersey and waste collected outside the State. The regulation acted in a non-discriminatory, even-handed manner in addressing a legitimate public problem. If a dump posed a substantial threat to public health and environmental quality, the place of origin of the waste deposited in it was entirely irrelevant.

Although incineration is a form of disposal authorized and regulated by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-2.1.2b, solid and liquid waste collected outside New Jersey cannot be incinerated in New Jersey. *P. L.* 1973, *c.* 363; *N. J. A. C.* 7:1-4. This position is particularly incongruous in light of Appellees admission in their answer to the complaint that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same. The burnability factor of each is identical (Appendix M, A109 *infra*).

Air pollution is not confined to artificially created state or municipal boundaries. It moves freely in "interstate commerce". *Georgia v. Tennessee Copper Co.*, 206 *U. S.* 230, 237 (1907); *United States v. Bishop Processing Company*, 287 *F. Supp.* 624 (Md. 1968). While a state has a legitimate local interest in regulating emissions into the air which its residents breathe, it cannot discriminate against or unduly burden interstate commerce in seeking to effectuate that interest. *Huron Cement Co. v. Detroit*, 362 *U. S.* 440, 443 (1960).

3. Effect Upon Interstate Commerce.

The direct burden imposed upon interstate commerce by the adoption of *P. L.* 1973, *c.* 363 is obvious and severe. Prohibitory legislation affects interstate commerce in a most basic and fundamental sense. As stated by Mr. Justice McKenna in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S., supra*, at 249, ". . . to prohibit interstate commerce is more than to indirectly affect it."

P. L. 1973, *c.* 363 directly prohibits the interstate disposal of solid and liquid waste. It is not unique in that respect. Since 1969, seven states have adopted laws which, to varying degrees, prohibit the disposal of solid waste collected in another state.[14] Three other states have imposed various regulatory limitations [15] (Appendix AA, A231 *infra*). The effect of these enactments is to retard, if not to entirely obviate, the national goal of achieving interstate

14. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

15. Delaware, Illinois and Louisiana.

cooperation in confronting the solid waste disposal problem (Appendix L, A103 *infra*).

More than ten years ago, Congress identified solid waste disposal as a problem of national concern. In 1965 it enacted the Solid Waste Disposal Act, *Pub. L.* 89-272, for the purpose of promoting "a national research and development program for new and improved methods of proper and economic solid waste disposal", 42 *U. S. C.* § 3251(b)(1), and providing financial resources to accomplish same. Five years later, the Resource Recovery Act of 1970, *Pub. L.* 91-512 was adopted to underscore the importance of resource recovery. In both cases, the Secretary of Health, Education and Welfare (now the Administrator of the Environmental Protection Agency) was directed to ". . . encourge cooperative activities by the States . . . encourage, where practicable, interstate, interlocal, and regional planning . . .; and encourge the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal". 42 *U. S. C.* § 3254.

Prohibitory and retaliatory legislation is clearly alien to the expressed congressional intent. It creates a climate attuned to inhibit rather than to promote the national interest.

In addition, the cost of solid waste collection and disposal, which is already significant, will rise even more. An estimated $3 billion was spent annually for solid waste collection and disposal at the time of the adoption of the Solid Waste Disposal Act, 42 *U. S. C.* § 3251 *et seq.*, 1965 *U. S. Code, Cong. and Adm. News*, p. 3614. The cost of said service reached an estimated $4.5 billion by 1970, 1970 *U. S. Code, Cong. and Adm. News*, p. 4553. The House Report noted:

> "The greatest amount of the moneys spent goes for *collecting* solid waste *and transporting* it to

some place where it may be dumped or burned."

1970 *U. S. Code, Cong. and Adm. News,* p. 4553.

The New Jersey Supreme Court recognized the obvious economic impact of its decision upon interstate commerce:

"The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks."

Hackensack Meadowlands v. Mun. Landfill Auth., 68 *N. J., supra,* at 476.

Assuming a cost increase at the same "modest" rate of $5 per ton calculated for Yonkers, there would be a yearly cost increase of $7.5 million to persons disposing of out-of-state wastes in New Jersey based upon 1971 tonnage estimates compiled by the New Jersey Department of Environmental Protection. *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra* at 461.

These figures do not take into account the economic harm which likely will be suffered by New Jersey in its efforts to dispose of the solid waste collected within its borders. Since a direct relationship exists in solid waste land disposal between cost and distance to disposal site, communities located in northern New Jersey will no doubt look to southern New York and eastern Pennsylvania, rather than to southern New Jersey, when existing landfill sites situated in the northern part of the state are consumed in an estimated 3 years. *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 461. Unless this Court hears the instant matter, New Jersey communities will be immediately foreclosed from seeking disposal alternatives in Pennsylvania, either now or in the future, because retaliatory legislation has already been adopted by that Commonwealth.

In wording and in practical effect, *P. L.* 1973, *c.* 363 imposes a direct and intolerable burden upon interstate commerce which appellants respectfully call upon this Court to review.

C. Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional on the ground that it discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N. J.* 67, 74, 110 *A.* 2d 24 (1954) continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

"It is designed to provide a prompt businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

• • •

> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." (emphasis added)

The trial judge's opinion reveals his determination as a matter of federal constitutional law, (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that *P. L.* 1973, *c.* 363, on its face, discriminates against interstated commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (Appendix R, A207 *infra*), Appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. I, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment as, indeed, there was no reason for them so to do. Even if their motion had originally been granted by the trial court, it would not have disposed of the matter on its merits, but merely led to a hearing of the numerous remaining issues of material fact. A reversal of the judgment of the trial court by an appellate tribunal would have the same substantive effect.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon interstate commerce. They were also deprived of their fundamental right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result was incomprehensible. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the

contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact:

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints*.
>
> • • •
>
> Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."
>
> (Appendix Q, A206 *infra*).

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.* 363 was not being attacked on Commerce Clause grounds alone.

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court

may deem appropriate. . . ." (Appendix X, A224 *infra*). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that *P. L.* 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment initially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

As a practical consequence of this action,[16] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly

16. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who stayed the mandate of the New Jersey Supreme Court.

addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean*, 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.*, 339 *U. S.* 306 (1950).

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue raised by their complaint prior to the final determination. *Rhodes v. Houston*, 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 *F.* 2d 959 (8th Cir. 1962), *cert.* den. 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within

due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.*, *supra*, at 678. It was asserted a second time less than two weeks later in a motion addressed to the New Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court,

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not reasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."
>
> (Appendix C, A57, *supra*)

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

CONCLUSION.

The New Jersey Supreme Court has decided an issue of national importance in a way not in accord with the decisions of this Court, and in conflict with decisions of other state and federal courts which have recently decided cases involving environmental questions.

It has also so far departed from the accepted and usual course of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

Because of the critical issues of great and general public interest involved, it is respectfully urged that this Court note jurisdiction and hear the case on its merits.

Respectfully submitted,

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ARTHUR MEISEL,
JAMIESON, MCCARDELL,
MOORE, PESKIN & SPICER,
A Professional Corporation,
Attorneys for Appellants.

JOHN R. PADOVA,
SOLO & PADOVA,
Special Legal Counsel to Appellant City of Philadelphia.

Certificate of Service.

We hereby certify that on this 13th day of February, 1976, three copies of this Jurisdictional Statement were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080; and to David N. Samson, Esquire, attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052.

We further certify that all parties required to be served have been served.

By .....
HERBERT F. MOORE

By .....
ARTHUR MEISEL

APPENDIX A-1.

SUPERIOR COURT OF NEW JERSEY.
LAW DIVISION—MERCER COUNTY.
DOCKET NO. L-15068-73 P. W.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF GLEN COVE, A MUNICIPAL CORPORATION OF THE STATE OF NEW YORK, LANDFILL & DEVELOPMENT CO., A N. J. CORPORATION, MacSANITARY LANDFILL, INC., A N. J. CORPORATION, KINSLEY'S LANDFILL, INC., A N. J. CORPORATION, AND DeLORENZO-INTERSTATE WASTE REMOVAL COMPANY, A N. J. CORPORATION, JOHN P. FAZZIO, INC., T/A JOHN P. FAZZIO LANDFILL COMPANY, AND CONTINENTAL VANGUARD, A N. J. CORPORATION,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Defendants.

ORAL OPINION.

Before:

HONORABLE GEORGE Y. SCHOCH, J.S.C.

Place:

Mercer County Courthouse,
Trenton, New Jersey.

March 25, 1974.

Appearances:

JAMIESON, WALSH, MCCARDELL, MOORE & PESKIN, by MR. HERBERT F. MOORE, and ARTHUR MEISEL, appearing on behalf of the plaintiffs, attorneys.

MR. VINCENT J. DOTOLI, appearing on behalf of defendant Fazzio, attorney.

WILLIAM F. HYLAND, Attorney General of the State of New Jersey, by MR. MARK L. FIRST, Deputy Attorney General, appearing on behalf of the defendant-State of New Jersey.

THE COURT: Well, there are three separate points raised by the motions or, I should say, by the motion and countermotion presented here. Each side makes this argument for summary judgment conceding that as to these particular issues there are no material issues of fact involved and so that the issues before the court at the moment are ripe for summary judgment.

The New Jersey Legislature passed a law, Public Law 1973, Chapter 363, which says in part, "No person shall bring into this state any solid or liquid waste which originated or was collected outside the territorial limits of the state, except garbage to be fed to swine in the State of New Jersey, until the Commissioner shall determine such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this state."

There were emergency regulations promulgated by the Commissioner, N. J. A. C. 7:1-4.1 and N. J. A. C. 7:1-4.2. The second regulation sets forth certain exceptions, descriptions of exceptions to the prohibition of solid or liquid waste, including separated waste material that is

intended for re-cycling and certain other exceptions which are immaterial to the issue at hand.

Obviously the first matter that must be decided is whether the item of solid or liquid waste, we have been calling it garbage but it obviously includes more than just garbage, whether that item is a proper subject of interstate commerce. If it is not then there would be no prohibition against the state passing a law that prohibits the passage or importation of such item either through or into the state, since it would not violate the interstate commerce clause of the United States Constitution.

With reference to that point my attention has been called to two cases. One is the case of *Barnett v. A-1 Scavenger Service Co., Inc.*, a Missouri Court of Appeals case (1971) reported at 466 Southwestern 2d at 150. That case involved an interpretation of the Fair Labor Standards Act. A helper on a refuse truck who worked for an employer engaged exclusively in the collection and disposal of garbage and waste in the City of St. Louis, whether or not he was subject to the Fair Labor Standards provisions regarding minimum wage and overtime, because the employer collected waste from companies engaged in interstate commerce. At page 156 the court said, and I quote, "In the instant case it can scarcely be plausibly argued that the garbage and refuse after being collected by plaintiff entered the channels of interstate commerce, or the mere transportation of such garbage and other refuse for the purpose of disposing of it could be said to be commerce among the several states within the meaning of the Fair Labor Standards Act."

So we have the authority of that case which indicates that the transportation of trash and waste across the state line is not engaging in interstate commerce. On the other hand, there is a case of *U. S. v. Pennsylvania Refuse Re-*

moval Association, at 242 Federal Supplement 794, U. S. District Court case for the Eastern District of Pennsylvania (1965) where the court said at page 799, "Defendants argue at various points in their brief that because trash itself is by definition a worthless commodity, it cannot be the subject of 'trade or commerce' as those terms are used in the Sherman Act. That argument misses the point. Here, the relevant subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the words 'trade or commerce' as used in the Act, the defendant's position has no merit." And on appeal to the U. S. 3rd Circuit Court reported at 357 Federal 2d, 806 (1966), the 3d Circuit Court said at page 808, "From the record we are satisfied that the factual holding of the trial judge that 'the hauling and disposing of refuse was an integral part of the refuse removal business' is entirely correct. In that situation the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state is a vital element of the one business operation which plainly is a proper subject of interstate commerce."

Then there is a citation of *Hoke v. U. S.*

Then we have the case of *U. S. v. Bishop Processing Company*, U. S. District Court, District of Maryland (1968) 287 Federal Supplement 624, which I think could be analogized to our case. In the Bishop case the question was whether a business or factory that polluted the air and that air pollution, malodorous pollution obviously affected business conditions and property values in the neighboring state when the wind blew the smell and pollutants across the state line. One of the questions that had to be decided was whether the Clean Air Act covered this activity, that is, whether or not movement of the air pollutants across state lines constituted interstate commerce.

And the District Court in Maryland decided, at page 629, that it did, saying, "The movement of pollutants across a state line is proper jurisdictional basis for the provisions of the Act relating to the abatement of interstate air pollution. Such movement of pollutants across state lines constitutes interstate commerce subject to the power granted the Congress by the Constitution to regulate such commerce."

From my analysis of the cases that I have just cited I think that the proper viewpoint to accept is that of the 3d Circuit that the transportation of waste across the state line is a subject of interstate commerce and, therefore, subject to the controls of Congress in accordance with the interstate commerce laws. However, that is not dispositive of the problem. The plaintiff suggested the second point that the Federal Government has pre-empted this field, and when I say this field I mean the field of prohibition of interstate movement of solid waste for either treatment or disposal.

I prefer to decide the problem on the basis of discrimination rather than on the theory of pre-emption because I think the issue is more clearly defined when we consider discrimination. I have already read certain portions of the federal code. I will refer to them again. 42 U. S. C. A. 3254. Let me read this in full. "The secretary shall encourage cooperative activities by the states and local governments in connection with solid waste disposal programs; encourage, where practicable, interstate, interlocal and regional planning for, and the conduct of, interstate, interlocal and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal."

In Section 3251 there are five parts to subsection (b) setting forth the purposes of this particular law, all of

which talk about assistance, technical advice, training grants, et cetera. None of which seems to me indicate the type of pre-emption that I feel would be required in order to find the Federal Government has pre-empted this field in the fashion that the plaintiffs suggest and to arrive at the decision the plaintiffs suggest.

So we come to the question of whether or not this statute passed by the Legislature of New Jersey which, as I have already indicated, I find involves material which is the subject of interstate commerce, whether the statute discriminates against interstate commerce to the extent that it should be declared unconstitutional. I immediately concede that I am aware of the cases which hold that there is a strong presumption that the statute is constitutional and the legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. Further, to declare a statute unconstitutional is a judicial power to be delicately exercised, quoting from *Harvey v. Essex County Board of Freeholders*, 30 N. J. 381. The Court in the case of *Supermarket General v. Sills*, 93 N. J. Superior, 326 (Chancery Div. 1966) cites a quotation from the U. S. Supreme Court case of *Head v. New Mexico Board of Examiners* at page 345. The New Jersey Court says, "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. State regulation based on the police power which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand."

As Judge Schreiber said in the case of *Hackensack Meadows Development v. Municipal Sanitary Landfill Authority*, a Chancery Division slip opinion dated February 13, 1974, page 12 of that slip opinion, "State regulations and laws based on the exercise of the police power

may only stand if they do not discriminate against interstate commerce."

I am aware of the long line of cases that deal with the transportation of deleterious substances. They are listed in *Baldwin v. Seelig*, 294 U. S. 511 (1934), opinion of Mr. Justice Cardozo, at page 525, 7 Lawyers Ed., 1039, which recites some of the cases which have upheld the statutes regulating the importation of unhealthy cattle, decayed foods. Mr. Justice Cardozo says, "Things such as these are not proper subjects of commerce (and notes) there is no unreasonable interference when they are inspected and excluded."

I think the situation is different in this case before me and I see a relationship between the natural gas cases and this case. Some may say it's a strained reason but the natural gas cases that I refer to are *Pennsylvania v. West Virginia*, 262 U. S. 553, and *West v. Kansas Natural Gas Company*, 221 U. S. 229. Each of those cases, the so-called home state attempted to prevent the exportation of one of its natural resources and the statutes were struck down as unconstitutional in derogation of the free flow of commerce, that it is Congress' prerogative to control and not the state.

If we consider, as I do, that the purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste that is presented to the various disposal companies, the natural resources, the land, the availability of the land will be prolonged or extended or used less quickly. I don't see any difference between a state being prevented from prohibiting exportation of natural gas than the state being prevented from prohibiting the importation of something that will in effect use one of the state's natural resources.

Therefore, I find that the statute in question here is attempting to control material that is properly the sub-

ject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional.

You will prepare an order, Mr. Moore?

MR. MOORE: Yes, sir.

(End)

COURT REPORTERS CERTIFICATION.

I, ANTHONY DI STEFANO, one of the Official Court Reporters of the Superior and County Courts of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken by me in the above entitled matter.

ANTHONY DI STEFANO
Anthony Di Stefano

Dated: March 28, 1974.

APPENDIX A-2.

[127 *N. J. Super.* 160, 316 *A.* 2d 711 (Ch. 1974)]

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HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION AND STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLAINTIFFS, *v.* MUNICIPAL SANITARY LANDFILL AUTHORITY, A JOINT VENTURE OF WILLIAM A. KEEGAN, INC., RECLAMATION AND IMPROVEMENT CO., PETER ROSELLE & SONS, INC., AND DELAWARE SANITARY CO., DEFENDANTS, AND CITY OF YONKERS, NEW YORK, DEFENDANT-INTERVENOR.

Superior Court of New Jersey
Chancery Division
Decided February 13, 1974.

• • •

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Mr. Mark L. First, Deputy Attorney General, for plaintiffs (*Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

Mr. David Samson for defendants (*Messrs. Lieb, Wolff & Samson,* attorneys).

Mr. Eugene J. Fox, of the New York Bar, Corp. Counsel for City of Yonkers, pro hac vice for defendant-intervenor (*Messrs. Schapira, Steiner & Walder,* attorneys).

SCHREIBER, J. S. C. The Hackensack Meadowlands Development Commission (HMDC) and the State of New Jersey, Department of Environmental Protection (DEP),

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seek to enjoin the Municipal Sanitary Landfill Authority (MSLA) from accepting for disposal in its landfill site located within
the Hackensack Meadowlands District any solid wastes originating from or collected outside the territorial limits of New Jersey. Both HMDC and DEP had adopted regulations, effective September 1, 1973 and August 31, 1973, respectively, which prohibited such disposal.

An *ad interim* restraint, consented to by defendant, had been entered pending determination of the request for a permanent injunction. On the return date of the order to show cause defendants answered by challenging the constitutionality of the regulations and the Waste Control Act, *N. J. S. A.* 13:1I-1 *et seq.* The hearing was adjourned to allow plaintiffs time to respond to the challenges. In the meantime the City of Yonkers, New York, whose refuse was being deposited on the MSLA site, moved for and was granted leave to intervene as a party defendant. No testimony was taken at the hearing. The parties relied on affidavits and the transcript of proceedings taken before the Hackensack Meadowlands Commission on June 18, 1973.

MSLA has made a three-fold attack. It contends that (1) the Waste Control Act, regulation *N. J. A. C.* 7:26-1.5 promulgated thereunder, and certain regulations of HMDC, namely, *N. J. A. C.* 19:7-1.1(g) and (h), are invalid, arbitrary and unreasonable; (2) the procedure followed by DEP in promulgating its rule, *N. J. A. C.* 7:26-1.5, violated due process of law, and (3) all the above designated regulations and the Waste Control Act must fall because they violate Article 1, Section 8, paragraph 3 (the Commerce Clause) and Article 4, Section 2 (the Privileges and Immunities Clause), of the U. S. Constitution.

I

The Waste Control Act, *N. J. S. A.* 13:1I-1 to 8, recites that the Legislature found that the disposal of wastes generated or collected outside the State poses a threat to the quality of New Jersey's environment and that the Commissioner of Environmental Protection was empowered to create

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regulations prohibiting the "landfill of solid waste" and the "disposal of liquid wastes" within the State which originated or were collected outside New Jersey. The Commissioner adopted Regulation *N. J. A. C.* 7:26-1.5, effective August 31, 1973, which reads as follows:

> Out of State waste
>
> (a) No person engaged in the collection of solid or liquid wastes shall dispose of any solid or liquid wastes which originated or were collected outside the territorial limits of this State in sanitary landfills in the Hackensack Meadowlands District.
>
> (b) No person owning or operating a sanitary landfill within the Hackensack Meadowlands District shall accept for disposal in such sanitary landfill any solid or liquid wastes which originated or were collected outside the territorial limits of this State.

Defendant contends that there is no basis for the Legislature's findings, that the regulation is invalid in the absence of a showing of a causal relationship between banning out-of-state garbage in New Jersey and a threat to its environment, and that the regulation is overly broad by banning all wastes. The statute and the administrative regulations are presumptively valid. *Harvey v. Essex County Board*

of Freeholders, 30 *N. J.* 381 (1959); *Burton v. Sills*, 53 *N. J.* 86 (1968); *State v. Profaci*, 56 *N. J.* 346 (1970). Since one can reasonably and readily conceive of facts which would support the Legislature's findings and the Commissioner's regulations, the onus is on defendant to establish that the Legislature's and Commissioner's actions are arbitrary. *Consolidation Coal Co. v. Kandle*, 105 *N. J. Super.* 104 (App. Div. 1969), aff'd 54 *N. J.* 11 (1969); *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n*, 120 *N. J. Super.* 118 (App. Div. 1972); *Borden's Farm Products Co., Inc. v. Baldwin*, 293 *U. S.* 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934). Defendant's proof consisted of an affidavit of an engineer, Dennis L. Backus, and the transcript of proceedings before the Hackensack Meadowlands Commission held on June 18, 1973 with respect to its proposed regulations. The affidavit asserts that quantities of solid

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wastes are used for construction purposes and that therefore a complete ban on disposal of out-of-state solid wastes is inappropriate. This conclusion does not necessarily follow because no reference is made to the amount of New Jersey refuse which is being used for landfill purposes, the limited amount of area available, and the environmental and public health impacts involved. Further, an affidavit of Lino Pereira, the Principal Environmental Engineer of DEP, asserts that sanitary landfills "present a pollution danger because they do not conserve or recover resources but bury them, and because they severely limit the future use of the land on which they are located." Additionally, he avers that sanitary landfills present a unique fire problem. An affidavit of Bernhard V. Lind, Acting Chief of the Bureau of Solid Waste Management in the DEP, asserts

that of the 55,000 tons per week of solid waste being disposed of in the Hackensack Meadowlands District, 10,000 tons originated outside New Jersey and there was an acute shortage of remaining landfill life located there. In view of all the foregoing, it is obvious that MSLA has not met its burden.

The same type of attack has been made upon regulations *N. J. A. C.* 19:7-1.1(g) and (h) of the HMDC. These regulations read as follows:

> 19:7-1.1(g). No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> 19:7-1.1(h). All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission, together with their applications, as provided in Sections 3 and 4 of this subchapter, a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment.

Defendant has made no showing that there was no basis for these regulations. The affidavits of William D. McDowell, Executive Director of HMDC, and George D. Cascino, its

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Chief Engineer, disclosed that three surveys had been made to determine the volume and origin of solid waste disposed of in landfills in the Hackensack Meadowlands District.

The first disclosed that in 1968 some 30,000 tons were entering the District each week, of which 4,000 tons originated outside New Jersey. HMDC study in 1971 revealed that the weekly tonnage was 42,000, of which 5,000 emanated from outside the State. In April 1973 HMDC updated its study. At that time weekly tonnage had increased to 55,000, of which 10,000 came from sources outside of New Jersey. The Commission concluded that the sites had only three years of life remaining and that banning of out-of-state garbage would extend the landfill life some six months.

Under the Hackensack Meadowlands Development Act the Commission must provide disposal facilities for the New Jersey municipalities (totalling 118, according to plaintiffs) which had been utilizing the District. *N. J. S. A.* 13:17-10(a), (b) and (e). The affidavits point out that the Commission needs as much time as possible to develop a viable alternate method of disposal. One cannot reasonably contend that promulgation of the regulations under the totality of these facts and circumstances was arbitrary.

Defendant also argues that the HMDC regulations contravene *N. J. S. A.* 13:17-6(w) and 13:17-10(b) and (e) by failing to provide for disposal facilities for waste equal to levels at the time the statute was passed, which levels included out-of-state waste. *N. J. S. A.* 13:17-6(w) authorizes HMDC "to provide solid waste disposal facilities for the treatment and disposal of solid waste, as hereinafter provided." *N. J. S. A.* 13:17-10 reads:

> (a) Within 6 months of the effective date of this act the commission shall undertake and complete a survey of the district to determine the total amount of solid waste treated and disposed on a daily basis in the district as of the effective date of this act by persons *in this State*.

> (b) The commission is hereby authorized, empowered and directed to guarantee that solid waste disposal facilities sufficient to treat and

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> dispose of the total amount of solid waste determined by its survey shall be available or be provided by the commission.
>
> • • •
>
> (e) The commission, in its discretion, may provide solid waste disposal facilities sufficient to treat and dispose of more than the total amount of solid waste determined by its survey, and may make such facilities available to persons other than those treating and disposing of solid waste in the district as of the effective date of this act. [Emphasis added]

Defendant reads these three sections together as guaranteeing continued use to *all* persons utilizing the disposal facilities in the Meadowlands at the time the act was passed. To interpret the statute in that way, however, one must delete the last three words in subsection (a). The inclusion of those words, "in this State," demonstrates that the Legislature was concerned about waste collected in New Jersey. If it intended to include all waste disposed of in the Meadowlands no matter where its origin, the phrase, "in this State" would not have been inserted, since, obviously, garbage dumped in the Meadowlands is dumped in this State. One must assume in interpreting a statute that the legislators would not insert a redundant or meaningless phrase. The only significance in these words is that the Legislature was interested in providing for disposal of New Jersey garbage—therefore, the remaining subsections, when referring to the "total amount of solid waste determined by its [the Commission's] survey," are concerned with the

total amount of garbage disposed of in the Meadowlands by *persons in this State, i.e.*, the total amount of New Jersey waste dumped in the Meadowlands. This is the only sensible interpretation. The concern of the New Jersey Legislature was to safeguard the area for New Jersey operations—not New York, Pennsylvania, or other jurisdictions. As Justice Jacobs wrote in *J. C. Chap. Prop. Owners', etc., Ass'n v. City Council*, 55 *N. J.* 86 (1969):

> When all is said and done, the matter of statutory construction here will not justly turn on literalisms, technisms or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation. [at 100]

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To the same effect: *State v. New Jersey National Bank and Trust Co.*, 62 *N. J.* 50 (1972). Defendant's contention that the regulations contravene the enabling statute is unsound for the statute mandates only that the Commission guarantee disposal facilities for New Jersey communities utilizing the landfill sites as of the effective date of the act.

II

Defendant attacks the procedure followed by the DEP in adopting *N. J. A. C.* 7:26-1.5, claiming that the failure to hold a hearing prior to adoption of the rule denied defendants due process. This contention has no merit. Plaintiff DEP caused the proposed regulation to be published in the *New Jersey Register* on July 5, 1973, with the statement that "interested persons may present statements or arguments in writing relevant to the proposed action on or before August 3, 1973." 5 *N. J. R.* 220(c). This notice was consistent with the Administrative Procedure Act, *N. J. S. A.* 52:14B-1, *et seq.*, and complied with *N. J. S. A.* 52:14B-4(a)(2), affording any interested person a reasonable opportunity to be heard. Defendant concedes that the act does not require a formal hearing and that it did not submit a statement or request a hearing. The uncontroverted statement in the affidavit of Mr. Lind is that no written statement or argument was received by DEP from any interested person. Under these circumstances there was no constitutional or statutory requirement that a hearing be held prior to the promulgation of the regulations. *Motyka v. McCorkle*, 58 *N. J.* 165 (1971).

III

There remains defendant's constitutional challenges. *i.e.*, that the DEP and HMDC regulations set forth above violate Article I, Section 8, paragraph 3 (Commerce Clause) and Article IV, Section 2 (Privileges and Immunities Clause) of the U. S. Constitution. (Defendant has not

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argued the Waste Control Act is unconstitutional). Defendant has not vigorously advanced its argument with respect to Article IV, Section 2, and it is not necessary to deal with that contention in depth. Suffice it to say there are serious infirmities in that position, such as the fact that it is not applicable to corporations and that it only applies where there is no substantial reason for the discrimination. *Paul v. Virginia*, 8 Wall. 168, 75 *U. S.* 168, 19 L. Ed. 357 (1868); *Hemphill v. Orloff*, 277 *U. S.* 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); *Toomer v. Witsell*, 334 *U. S.* 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

Article I, Section 8, provides that "Congress shall have power * * * to regulate commerce * * * among the several States * * *." DEP and HMDC contend that garbage is not a legitimate subject of trade or commerce and therefore

not within the purview of the Commerce Clause. They rely upon a number of cases which recognize the power of a state to forbid the sale or importation of impure foods or such articles as would spread disease and pestilence and would be immediate causes of destruction of or injury to human health and life. A state's prohibition of the interstate transportation of diseased animals has been held not to contravene the Commerce Clause. *Clason v. Indiana*, 306 *U. S.* 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). Similarly, statutes forbidding the importation and sale of adulterated or injurious food or drugs have withstood constitutional attacks. *Crossman v. Lurman*, 192 *U. S.* 189, 24 S. Ct. 234, 48 L. Ed. 401 (1904); *Price v. Illinois*, 238 *U. S.* 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915). In *Sligh v. Kirkwood*, 237 *U. S.* 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915), a Florida statute prohibiting the exportation of fruits which were unfit for human consumption was held valid. All these cases classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as nonmerchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease. The articles in-

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volved had no useful purpose and were *per se* dangerous to health. On the other hand, refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity. In passing, it might be noted that some successful incinerator systems which create waste heat for power generation exist in Germany, the Netherlands, France and Switzerland. In the instant situation there is no prohibition against the transportation of out-of-state garbage in or through New Jersey or the disposal of such refuse in New Jersey landfill sites located in places other than the Hackensack Meadowlands District.[1] It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal sites in the Hackensack Meadowlands District so that their life expectancy will be extended from 3 to 3½ years. In any event, the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce.

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It is well established that a state may, in the exercise of its police power, enact legislation, even though it may affect interstate commerce, provided that the Federal Government has not preempted the field. *Gibbons v. Ogden*, 9 Wheat 1, 22 *U. S.* 1, 6 L. Ed. 23 (1824); *Missouri, Kansas & Texas Railway v. Haber*, 169 *U. S.* 613, 18 S. Ct. 488, 42 L. Ed. 878 (1898); *Sligh v. Kirkwood, supra.; Yellow Cab*

1. *L.* 1973, *c.* 363, enacted on January 2, 1974, authorizes the Commissioner of the Department of Environmental Protection to determine when any solid or liquid waste which originated or was collected outside New Jersey may not be brought into the State. He has enacted regulations to that effect. *N. J. A. C.* 7:1-4.2. The effect of that statute and regulations is not before the court, although they may render this decision moot. It is interesting to note that the regulations adopted by the Commissioner except from the prohibition separated waste material intended for recycling or reclamation, municipal solid waste to be processed into reusable secondary materials, including fuel and heat, and "hazardous waste" which is to be treated in a solid waste disposal facility. The new law and regulations are concerned with the public health as well as environmental impact. The Commissioner's definition of "hazardous waste" would appear to fall into category of nonmerchantable material not subject to the Commerce Clause. *N. J. A. C.* 7:1-4.1.

Co. of Camden v. State, 126 *N. J. Super.* 81 (App. Div. 1973), certif. den. 64 *N. J.* 498 (1974).

The Federal Government has not adopted legislation dealing with the use of waste landfill sites. Further, the regulations and statute in question are clearly within the authority of the State's police power to conserve its landfill sites. It has been recognized that the dumping of garbage in a landfill is an unattractive and undesirable use of land and that it creates potential health and fire hazards. In *Shaw v. Byram Tp.*, 86 *N. J. Super.* 598 (App. Div. 1965), Judge (now Justice) Sullivan wrote:

> • • • Garbage or refuse is unsightly, smelly, attracts flies and rodents, and is a potential fire hazard. It is a prime source of disease and contamination. It has been called a necessary evil because it is a by-product of civilized society. Ordinarily, some provision is made for its collection and disposal by the local government. However, problems of public health and welfare are involved, and no matter how carefully regulated, garbage dumps present some hazard to a community, the degree of hazard being directly related to the amount of garbage dumped. [at 602]

In *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n*, Judge Lynch approved the Commission's finding that:

> Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [120 *N. J. Super.* at 122]

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However, state regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interestate commerce. In other words, the exercise of the police power may not be predicated on a method directed against interstate commerce. Plaintiffs concede that this is so. This nondiscrimination principle has been expounded in several United States Supreme Court decisions. In *Huron Portland Cement Co. v. Detroit*, 362 *U. S.* 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960), the City of Detroit had passed an ordinance which limited the permissible amount and density of smoke emissions from the boiler stacks of vessels while docked in the city. Huron Portland Cement Co., a Michigan corporation whose ships travelled among several states via the Great Lakes, challenged the code as an unlawful interference with interstate commerce. The court held that the ordinance was a valid exercise of the state's police power since it applied generally to *all* ships and did not discriminate in favor of local industry. Mr. Justice Stewart wrote:

> • • • State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. Ed. 702; Pennsylvania Gas Co. v. Public Service Com. 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 [PUR 1920E 18]; Milk Control Bd. v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752; Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 68 S. Ct. 358, 92 L. Ed. 455.
>
> • • •

It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designed to better the health and welfare of the community. * * * We conclude that no impermissible burden on commerce has been shown. [at 448, 80 S. Ct. at 818].

In *S. C. Hwy. Dept. v. Barnwell Bros. Inc.*, 303 *U.S.* 177 58 S. Ct. 510, 82 L. Ed. 1522 (1938), Mr. Justice Stone, in upholding a state law which limited the width and load of trucks on state highways, wrote:

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The commerce clause by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498, 30 L. Ed. 1189; Caldwell v. North Carolina, 187 U. S. 622, 626, 47 L. Ed. 336. It was to end these practices that the commerce clause was adopted.

In *Guy v. Baltimore*, 100 *U. S.* 434, 25 L. Ed. 743 (1879), a Maryland statute authorized Baltimore to collect wharfage fees from all vessels which docked in city wharves, provided that the material to be loaded or unloaded was not produced in Maryland. The city adopted an ordinance accordingly. The court commented:

In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States. [at 443]

The court invalidated the ordinance on the ground that:

* * * no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States more onerous public burdens or taxes than it imposes upon the like products of its own territory. [at 439]

The court also indicated that the wharves were property held for public use by the municipality, which could not "be permitted by discrimination" to impede commercial intercourse. That property held for public use may not be limited on a discriminatory basis has peculiar pertinence here. The New Jersey Legislature has deemed it appropriate to classify op-

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erations of garbage landfill sites as public utilities. *N. J. S. A.* 48:2-13. As such they would appear to be affected with a public interest as much as a municipally owned wharf. It might be noted that the State has expressly pro-

hibited a public utility from directly or indirectly making or giving "any undue or unreasonable preference or advantage to any person, locality or particular description of traffic, or subject any particular person, locality or particular description of traffic to any prejudice or disadvantage." *N. J. S. A.* 48:3-4.

DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious. Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.

Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be accomplished by discrimination based on the source of the refuse. In *Pennsylvania v. West Virginia*, 262 *U. S.* 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923), a West Virginia statute restricted the exportation of natural gas to ensure a sufficient supply for its own citizens. Although the Supreme Court recognized (at 598, 43 S. Ct. at 665) that "the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of people of the state," the statute had to fall because it interfered with interstate commerce.

Oklahoma enacted a law which prevented a pipeline company from transporting natural gas outside the state. The purpose of the law was to conserve natural gas in the Oklahoma fields for consumption in the state. In declaring the statute violative of the Commerce Clause, the U. S. Supreme

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Court, in *West v. Kansas Natural Gas Co.*, 221 *U. S.* 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911), commented:

> • • • The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare,—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United

States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court. [at 255, 31 S. Ct. at 571]

The Commissioner of Environmental Protection and the Hackensack Meadowlands Development Commission adopted the regulations in question to expand the life of the landfill sites for garbage collection in the Hackensack Meadowlands District from 3 to 3½ years. To attempt to accomplish that end by discriminating against sources of refuse solely because they originate or are collected outside the State under the circumstances here contravenes Article I, Section 8, Clause 3 of the U. S. Constitution. The regulations are invalid.

APPENDIX A-3.

[68 *N. J.* 451, 348 *A.* 2d 505 (1975)]

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HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and State of New Jersey Department of Environmental Protection, Plaintiffs-Appellants,

v.

MUNICIPAL SANITARY LANDFILL AUTHORITY et al., Defendants-Respondents,

and

City of Yonkers, New York
Defendant-Intervenor-Respondent

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al., Plaintiffs-Intervenors-Respondents,

v.

STATE of New Jersey et al., Defendants-Appellants.

Supreme Court of New Jersey.
Argued Dec. 2, 1974.
Decided Nov. 18, 1975.

• • •

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Mr. Stephen Skillman, Assistant Attorney General, argued the cause for defendants-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

Mr. Herbert F. Moore argued the cause for plaintiffs-respondents, City of Philadelphia, etc., et al (*Messrs. Jamieson, Walsh, McCardell, Moore and Peskin*, attorneys; *Mr. Moore*, of counsel; *Mr. Arthur Meisel*, on the brief).

Mr. Vincent J. Dotoli argued the cause for plaintiffs-intervenors-respondents, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co., et al.

Mr. David Samson argued the cause for defendants-respondents, Municipal Sanitary Landfill Authority, etc. (*Messrs. Leib, Wolff and Samson*, attorneys).

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for plaintiffs-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

MOUNTAIN, J.

These proceedings involve the joint review of two separate cases. In one case the judgment was entered pursuant to an opinion rendered in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). In the other, judgment was entered following the rendition of an oral opinion in a suit brought by the City of Philadelphia, together with the owners of several landfill operations in South Jersey, against the State of New Jersey and its Department of Environmental Protection (DEP). The [456] cumulative effect of these two judgments was to render unconstitutional certain sections of the Waste Control Act, N. J. S. A. 13:11-1 *et seq.*, together with regulations promulgated by DEP and by the Hackensack Meadowlands Development Commission (HMDC). The measures declared unconstitutional had as their purpose the exclusion from this State of solid waste originating elsewhere. In each suit the trial court found that the laws and regulations under review violated the Commerce Clause, Article 1, § 8, clause 3, of the United States Constitution.

I

The comprehensive authority and responsibility delegated by the Legislature to the HMDC in the Hackensack Meadowlands Reclamation and Development Act, N. J. S. A. 13:17-1 *et seq.*, includes the power to provide facilities for the treatment and disposal of solid waste. N. J. S. A. 13:17-6(w), 13:17-10. The Waste Control Act, N. J. S. A. 13:1I-1 et seq., as originally enacted, contained a legislative finding "that the quality of New Jersey's environment is being threatened by the treatment and disposal of wastes generated or collected outside the State . . ." N. J. S. A. 13:1I-2. By amendments to this act that became effective early in 1974, the Legislature further found that the whole problem of solid waste disposal was growing increasingly acute and that it continued to be seriously exacerbated by the importation of waste from without the State; it determined to and did forbid that any further such waste be brought into the State.[1] The Waste Control Act also au-

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited. [N. J. S. A. 13:1I-9]

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of

thorized and directed [457] the DEP to promulgate rules and regulations "prohibiting . . . the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State." N. J. S. A. 13:1I-4. Both HMDC and DEP promulgated regulations responsive to these legislative enactments, all looking to bar the importation of solid and liquid waste from outside the State.[2]

1. (Cont'd.)
the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act." P. L. 1973, c. 39. [N. J. S. A. 13:1I-10]

2. The pertinent portions of the HMDC regulations, which became effective September 1, 1973, reads as follows:

> (g) No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> (h) All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission [Hackensack Meadowlands Development Commission] . . . a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment. [N. J. A. C. 19:7-1.1]

The regulation of the DEP in its present form became effective February 1, 1974 and reads as follows:

> (a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials

[458]

In order to enforce these statutes and rules HMDC and DEP filed a complaint seeking permanently to enjoin Municipal Sanitary Landfill Authority (hereinafter MSLA)[3] from accepting for disposal at its landfill sites any solid waste originating or collected outside of the State's territorial borders.[4] At the same time, with the consent of the defendants, an order to show cause issued with temporary restraints prohibiting MSLA from accepting for disposal out-of-state waste. On the return day of the order to show cause, defendants answered, challenging the constitutionality of both the DEP and HMDC regulations as well as the statutes authorizing their promulgation. Thereafter the City of Yonkers, New York, was granted leave to intervene as a party defendant, as it was

2. (Cont'd.)
and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
>
> 4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State. [N. J. A. C. 7:1-4.2]

An earlier DEP regulation was before the trial court in the *Hackensack Meadowlands* case and is set forth in the court's opinion. 127 N. J. Super. at 164, 316 A. 2d 711. It was expressly repealed at the same time that it was superseded by the regulation last above quoted. N. J. A. C. 7:26-1.5.

3. Municipal Sanitary Landfill Authority is a joint venture wholly owned and operated by other named defendants. Its landfill operations are located in the Town of Kearny, within the Hackensack Meadowlands District.

4. Plaintiffs also sought statutory penalties pursuant to N. J. S. A. 13:11-5.

then using an MSLA site to dispose of its municipal refuse. No testimony was taken; the parties relied on affidavits and the transcript of previous [459] proceedings before the Hackensack Meadowlands Commission. In February, 1974, the trial judge filed a written opinion declaring the DEP and HMDC regulations to be in contravention of the Commerce Clause of the United States Constitution and therefore invalid. *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, supra,* 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). Judgment was temporarily stayed and on March 26, the Appellate Division granted plaintiffs' motion for a further stay pending determination of the appeal. Upon application by plaintiffs, this Court granted certification while the appeal was pending unheard in the Appellate Division, R. 2:12-2, 66 N. J. 337 (1974).

In January, 1974, in a separate plenary suit, the City of Philadelphia, together with other plaintiffs mentioned above, filed a complaint seeking a declaration that the Waste Control Act, as well as the regulations promulgated pursuant thereto, violated the Constitutions of both the United States and the State of New Jersey, and further seeking temporary and permanent injunctive relief restraining DEP from enforcing the statutory provisions and from adopting or enforcing regulations intended to be in furtherance of the statutory purpose. On March 25, 1974 the trial judge (not the judge who had heard the *Hackensack Meadowlands* case), on cross-motions for summary judgment, rendered an oral opinion declaring that N. J. S. A. 13:1I-9 and 10 effected an improper discrimination against interstate commerce and were hence unconstitutional. Following the filing of a notice of appeal to the Appellate Division, N. J. 102, 335 A. 2d 55 (1974), and the two actions were brought on for argument and disposition before us at the same time.

We thus face an issue of major public importance, namely, whether the regulations and statutes under review, designed to meet a pressing emergency in the life of the State, are of [460] such a nature as to violate the Commerce Clause, Article I, § 8, clause 3, of the United States Constitution.[5]

II

The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached "crisis proportions" due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,* 64 N. J. 190, 193, 314 A. 2d 65 (1974). The facts presented in the two cases now before this Court, together with the legislative concern with this problem to which we have alluded above and of which more will be said below, serve to reinforce very strongly our consciousness of this extremely serious situation.

The materials constituting the records on these appeals reveal that since the effective date of the creation of HMDC, July 1, 1968, three surveys have been conducted to determine the volume and origin of the solid waste disposed of in the landfills located within HMD. The first survey, mandated by N. J. S. A. 13:17-10(a), found that in 1968 approximately 30,000 tons of solid waste entered HMD each week, of which about 4,000 tons originated outside of New Jersey. The second survey, con-

5. We do not reach the question of the validity of the regulations and statutes when measured against the Privileges and Immunities Clause, Article IV, § 2 of the United States Constitution. The argument for invalidity was found to be totally without merit in the HMDC case, 127 N. J. Super. at 168-69, 316 A. 2d 711, and has not been briefed before us by the parties in either of the two suits.

ducted in 1971, indicated that the total volume of solid waste disposed of in the District had risen to 42,000 tons per week, 5,000 tons of which originated outside of the State. The latest survey, conducted in 1973, revealed further increases to total weekly deposits of 55,000 tons of [461] solid waste, of which about 10,000 tons came from out of state.[6]

On the basis of the 1973 survey, it was estimated by HMDC that the existing landfill sites within HMD had a useful life of about three years, but that a ban on out-of-state refuse would extend their availability by approximately six months. Since the adoption of the ban on out-of-state dumping, the HMDC revised its estimates of the remaining life of the landfills within the HMD. It was calculated that as of January 1, 1974, sanitary landfills within that area had a total life expectancy of about 38 months if the ban were to be continued, but an availability of only 26 months if the ban were to be lifted. Furthermore, there is little chance of reducing the volume of garbage being dumped in the HMD which originates within the State, for the reason, among others, that the Commission has become obligated by statute, N. J. S. A. 13:17-10, to provide solid waste disposal facilities for over 100 New Jersey municipalities.

State-wide, the picture appears much the same. It was estimated that in 1971 over 40,000 tons of solid waste originating out of state was being buried each week in the 340 sanitary landfills then existing within the State. DEP estimated that in that year 1.5 million tons of solid waste originating outside of the State was buried in New Jersey. DEP has also recently computed the total life of the existing sanitary landfill facilities to be about three years in northern New Jersey and approximately ten years in the

6. It was determined that about 6,700 of the 10,000 tons were being disposed of in the three MSLA sites.

southern part of the State. It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%, with the increase in some specific landfills being as high as 50 to 100%.

Compounding the shortage problem are other extremely important environmental considerations. Many existing land- [462] fills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

To obtain a more comprehensive picture of the problem now facing this State, we have taken judicial notice of another report, released in 1972, which has further documented the crisis in this area.[7] According to this report, in 1972 almost 95% of New Jersey's solid waste was disposed of in landfills within the State. Further projections indicate that with the existing landfill acreage and the projected rate of dumping, all land that is presently committed to landfill operations will be exhausted by 1982. Also recognized is the strong probability that other environmental considerations may further limit the use for landfill purposes of much of the existing allocated acreage. Moreover, the HMD is singled out as an area where "[a] critical test of creative solid waste management is now taking place . . . ." The report estimated that by the end of 1975, the supply of acreage available for landfill in the

7. State of New Jersey County and Municipal Government Study Commission, Solid Waste: A Coordinated Approach (1972).

Meadowlands would be exhausted, an estimate very similar to those made by the HMDC and noted earlier in this opinion.

We are also aware that very little has yet been done in any really effective way—on either a national or an interstate level to achieve a satisfactory solution to this pressing problem. The scope of federal legislation is thus far quite limited. The Solid Waste Disposal Act, 42 U. S. C. A. § 3251 *et seq.*, originally provided only for "financial and technical [463] assistance and leadership . . ." to develop new methods to reduce the volume of waste and to provide for economical methods of disposal, 42 U. S. C. A. § 3251(a)(6). The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act to provide financial assistance for the construction of solid waste disposal facilities and to furnish technical and financial assistance to promote and develop new methods of resource recovery. See, *e.g.*, 42 U. S. C. A. §§ 3251(b)(1), 3254b. Although the Act as it now reads also provides for the encouragement of interstate cooperation to resolve the waste disposal problem, 42 U. S. C. A. §§ 3254, 3254a, nothing has been brought to our attention to indicate that New Jersey has entered into any agreement with her neighboring states of New York and Pennsylvania looking to this end.[8]

8. In 1970, the Tri-State Transportation Commission [Connecticut, New York, and New Jersey] published a report entitled *Managing the Natural Environment—A Regional Plan for Water, Sewage, Air and Refuse*. The Commission, interestingly, foresaw the problem with which we are now faced, in its recognition that an interstate solution to the solid waste problem might be difficult to achieve because of increasing resistance to waste "imports." The Commission, therefore, recommended the continued use of landfill sites wherever possible along with regional development of large, efficient incinerators for the cities and inner suburbs. *Id.* at 32. To date, however, the Commission has been ineffective in bringing about the implementation of any of these suggestions.

At the State level there has been more significant activity. In 1970 the Bureau of Solid Waste Management of DEP published the *New Jersey State Solid Waste Management Plan*, which, among other proposals, recommended the creation of "Solid Waste Management Districts."[9] The *Solid Waste Management Plan* has been approved by the Federal Environmental Protection Agency as the official State plan for New Jersey.

Before the release of the *New Jersey Plan* in 1970, the Legislature had enacted the "Incinerator Authorities Law," [464] N. J. S. A. 40:66A-1 *et seq.*, delegating to municipalities the authority to provide solid waste collection and disposal facilities on a local basis. Prior thereto, in 1968, the "Solid Waste Management Authorities Law" had been enacted, N. J. S. A. 40:66A-32 *et seq.*, permitting the governing bodies of one or more municipalities to create solid waste management authorities to construct and operate incinerators and other solid waste treatment facilities. 1970, the year DEP released its *New Jersey Plan*, saw three further related enactments by the Legislature. The "Solid Waste Utility Control Act," N. J. S. A. 48:13A-1 *et seq.*, recognizing the need for state-wide control over the solid waste industry, provided that the Board of Public Utility Commissioners assume the duties of "regulating [the] economic aspects of solid waste collection, disposal and utilization service . . . ." N. J. S. A. 48:13A-2. The "County Solid Waste Disposal Financing Law," N. J. S. A. 40:66A-31.1, *et seq.*, took note of the fact that the cost of constructing disposal facilities would be prohibitive for many municipalities, and delegated to counties the authority to

9. The Plan recommended either a "maximum sanitary landfill strategy" or a "maximum incineration strategy," depending on the availability of sanitary landfill acreage.

purchase or construct such facilities within the county "either alone or jointly with any municipality." N. J. S. A. 40:66A-31.4(1). Finally, the "Solid Waste Management Act," N. J. S. A. 13:1E-1 et seq., provided DEP with the authority to "supervise solid waste collection and disposal facilities or operations," and to plan all future facilities having in mind that they should conform to "reasonably contemplated development of comprehensive community or regional solid waste collection and disposal facilities and operations and to any State-wide, regional, county and intercounty plans for solid waste management," N. J. S. A. 13:1E-4. These statutes are in addition to the Hackensack Meadowlands Reclamation and Development Act and the Waste Control Act that are earlier discussed above.

Supplementing these statutory provisions, the HMDC has recently announced blueprints to phase out all dumping [465] in the Meadowlands by 1979. It is currently planning to construct a baling plant to compact waste into solid, nonflammable building blocks that may then be used as the base of a 2,000 acre meadowlands park located upon existing landfill sites. Also projected is a resource-recovery plant.

Assuming that plans such as these formulated by the HMDC are implemented within the proposed time period, it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. Increasing the lifespan of the HMDC landfills would also alleviate future pressure on other landfills located throughout the State, to accept waste now handled by HMDC, thereby preventing any acceleration of their depletion and preserving

lands in other areas of the State from becoming disposal areas.[10]

III

It is in the light of these facts and with a full realization of the magnitude of the problem, that we address ourselves to the issue as to whether or not the statutes and regulations under attack must fall because they are found to constitute an impermissible burden upon interstate commerce. In both cases now before us the State preliminarily contends that the question of the significance of the burden should not be reached, as the movement of garbage [466] and refuse, things not of commercial value and harmful to the health and welfare of the citizens of the State, does not in fact constitute interstate commerce within the meaning of the constitutional phrase. Therefore, it is argued, any statutes or regulations prohibiting the importation of these deleterious and valueless substances would not violate the Commerce Clause. The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, through the promulgation of regulations by DEP, has in effects been amended to exclude only that refuse which has no value either for fuel or recycling purposes.

The theory that objects harmful to the general public fall beyond the purview of the Commerce Clause has long been recognized by the United States Supreme Court. Perhaps the best articulation of this doctrine appears in

10. There is every indication that this was the true reason for the enactment of the amendments to the Waste Control Act. (L. 1973, c. 363). Following the promulgation of the regulations banning out-of-state dumping in HMDC, the out-of-state wastes were then carried to smaller landfill sites in New Jersey which had been originally designed to serve only neighboring municipalities. Thus, in order to prevent the total depletion of these landfills, a statewide ban on solid waste imports was enacted.

Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 8 S. Ct. 689, 31 L. Ed. 700 (1888):

> • • • Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightly exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. [125 U. S. at 489, 8 S. Ct. at 700, 31 L. Ed. at 708]

Accord, Baldwin v. Seelig, 294 U. S. 511, 525, 55 S. Ct. 497, 79 L. Ed. 1032, 1039 (1935); *Sligh v. Kirkwood*, 237 U. S. 52, 59-60, 35 S. Ct. 501, 59 L. Ed. 835, 838 (1915). *See Crossman v. Lurman*, 192 U. S. 189, 196-97, 24 S. Ct. 234, 48 L. Ed. 401, 404 (1904); *Plumley v. Massachusetts*, 155 U. S. 461, 468, 472, 15 S. Ct. 154, 39 L. Ed. 223, 225, [467] 227 (1894). Also pertinent to the proposition that garbage or refuse is not an article of interstate commerce is the decision in *Clason v. Indiana*, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). That case involved the validity of an Indiana statute which required that within 24 hours after the death of certain large animals, the owners should burn or bury the carcasses or deliver them to a disposal plant licensed to do business within the state. Transportation for disposal to points outside the state was prohibited. 306 U. S. at 441, 59 S. Ct. 609, 83 L. Ed. at 860. The Supreme Court, after recognizing that the purpose of the statute was not discriminatory, but rather to promote the health of the people, concluded that no impermissible burden on interstate commerce had been shown to exist or as likely to occur. *Id.* at 444, 59 S. Ct. 609, 83 L. Ed. at 862.

The teaching of these cases seems to be that commodities or substances injurious to the public health are not "articles of commerce" within the meaning of the constitutional phrase. Their lack of market value coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause.

Nevertheless, refuse or solid waste may have intrinsic value of its own. As the trial judge noted in *Hackensack Meadowlands*, ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity." 127 N. J. Super. at 170, 316 A. 2d at 716. Based on this factor, that court concluded that "the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce." *Id.* We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for recycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce [468] is involved, as these

regulations do clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.

The amendments to the Waste Control Act, N. J. S. A. 13:1I-9 and 13:1I-10,[11] totally banning the disposal of solid waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless, as we have pointed out, the DEP regulations, issued in response to this legislation, do except from the ban on out-of-state refuse those types of solid waste which may have a value for recycling or for use as fuel.[12] In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of "merchantable" items or legitimate "articles of trade," as those wastes which can be put to effective use are explicitly excepted from the ban. Any assertion that the Commerce Clause applies here must therefore rest on the proposition that the mere transportation and disposal of valueless waste between states constitutes interstate commerce within the meaning of the constitutional provision.

A short time ago, in *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E. D. Pa. 1965), *aff'd*, 357 F. 2d 806 (3d Cir.), *cert. denied*, 384 U. S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966), the transportation and disposal of refuse was itself specifically found to constitute interstate commerce. That case was a Sherman

11. Quoted above in footnote 1.

12. DEP was enjoined by the decision below from enforcing these regulations as well as the relevant sections of the Waste Control Act. These regulations are quoted in footnote 2 above.

antitrust action brought against an association of refuse removers in the greater Philadelphia area who collected in Pennsylvania but often dumped in New Jersey. 242 F. [469] Supp. at 796. The District Court found that the government had clearly met its burden of showing that defendants' business was commerce, and was interstate in nature. *Id.* at 796-97. The court emphasized that the real subject of "trade or commerce" was not the worthless garbage that was being transported but rather the valuable service of its removal and disposal. *Id.* at 799.

The *Pennsylvania Refuse* case affords an illustration of the part played by the Commerce Clause as justification for bringing a particular business scheme within the reach of a Congressional regulatory enactment. The Sherman Act purports only to prohibit as illegal *certain* combinations in restraint of trade or commerce, namely, those where the trade or commerce is interstate in nature. This is the *affirmative* aspect of the Commerce Clause—to support some exertion of federal control or regulation. Similarly, persons engaged in a disposal business, interstate in nature, have been found to come within the scope of the federal Fair Labor Standards Act. *Schultz v. Instant Handling, Inc.*, 418 F. 2d 1019 (5th Cir. 1969); *Barnett v. A-1 Scavenger Service Co.*, 466 S. W. 2d 150 (Mo. Ct. App. 1971). But we deal here, in the case before us, with what are customarily called the "negative implications" of the Commerce Clause, the extent to which it may be invoked—not to support an exercise of federal regulation—but rather to strike down or restrict state legislation. The Supreme Court has understandably adopted a very sweeping concept of the Commerce Clause in its affirmative application, in order to further the extent of Congressional control. A much more confined notion of the reach of this provision has, however, been manifested, as we shall see, when it has been invoked to prohibit or limit state action.

IV

Assuming for present purposes that the service of transporting and disposing of solid waste in the factual con- [470] text here presented is in fact interstate commerce in the constitutional sense, we next consider the contention that the relevant sections of the Waste Control Act amount to an improper effort to regulate such commerce since such control lies within the exclusive cognizance of the federal government. In considering this preemption argument in relation to the cases before us, we note initially that in the *Hackensack Meadowlands* case the trial court determined that in this area of solid waste disposal no such preemption is to be found. 127 N. J. Super. at 171, 316 A. 2d 711.

The need to determine whether, in a particular segment of interstate commerce, a state is precluded from acting because of federal preemption is the direct result of the landmark decision of the United States Supreme Court in *Cooley v. Board of Wardens*, 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851). There the Court for the first time clearly recognized that states have concurrent authority with the federal government to deal with those subjects of interstate commerce which do not necessarily require a national or uniform system of regulation. In a more recent statement appearing in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), Justice Brennan laid down the rule that a state would be precluded from acting only where either the "nature of the subject matter" or an "explicit declaration of congressional design" indicated that state efforts were to be precluded. *See* 373 U. S. at 143-152, 83 S. Ct. 1210, 10 L. Ed. 2d at 257-62.

The problem which arises in most instances where Congress has acted—as is here the case—results from there

having been a failure on the part of Congress to make clear whether there was or was not a desire and intent on its part to exercise exclusive control in a particular area. The Supreme Court has recognized that "in the final analysis, there can be no one crystal clear distinctly marked formula," *Hines v. Davidowitz*, 312 U. S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941), resort to which will in all cases unequivocally reveal Congressional intent. *Benson, The Supreme* [471] *Court and the Commerce Clause*, 1937-1970 at 277-78 (1970).

Fortunately, although Congress has acted in this field through the passage of the Solid Waste Disposal Act of 1965 and its subsequent amendments, it has clearly indicated its intention not to preempt the area. As we have noted earlier, federal legislation has thus far been largely limited to providing "financial and technical assistance and leadership" to develop new methods of disposal and resource recovery and to reduce waste. In the Congressional findings is a pronouncement that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." 42 U. S. C. A. § 3251(a)(6). We also note that severe budgetary cuts in recent years have reduced federal action even below that originally envisioned in the Solid Waste Disposal Act. For example, the Nixon Administration cut the federal solid waste budget from $30 million in 1973 to a projected $5.8 million for the fiscal year 1974, and sought to restrict the federal role to the control and disposal of hazardous wastes. No further funds were provided for such items as research and development, and technical assistance was substantially curtailed. See Environmental Law Institute, *Federal Environmental Law* 1307-1310 (1974).

It is entirely clear that the case for federal preemption must fail. Congress has encouraged state action; it has not precluded it.

V

In considering whether the statutes and regulations here under scrutiny do or do not constitute an impermissible regulation of interstate commerce, we bear in mind that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. Seelig, supra,* 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 1038 (1935). Primarily the purpose sought to be served by including the Commerce Clause in the Constitution was to check or eliminate the *economic* discrimination among the states that had been so rampant under the Articles of Confederation. *E.g., Baldwin v. Seelig, supra,* 294 U. S. at 521-23, 55 [472] S. Ct. 497, 79 L. Ed. at 1037-38; *H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 533-35, 69 S. Ct. 657, 93 L. Ed. 865, 871-72 (1949); *Ribble, State and National Power Over Commerce* 3-4 (1937).

Despite this broad grant of power given Congress by the Commerce Clause, innumerable problems have continuously arisen. This is in large part because the states, in the exercise of their police power to protect the health, welfare and safety of their citizens, have passed many laws which often in effect do directly regulate interstate commerce. Thus over the years the United States Supreme Court has been called upon to arbitrate between these competing demands of state and federal power.

The cases before us present such a situation. We have no difficulty in finding, as did the courts below, that

extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State. Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw v. Byram Township,* 86 N. J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N. J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> • • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission,* 120 N. J. Super. 118, 122, 293 A. 2d 426, 428 (App. Div. 1972); emphasis in original]

[473]

We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid,

and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power. See, for example, *Adams v. Shannon*, 7 Cal. App. 3d 427, 432, 86 Cal. Rptr. 641, 644 (Ct. App. 1970); Garton, *Ecology and the Police Power*, 16 S. D. L. Rev. 26 (1971).

Thus the underlying issue is whether or not this exercise of residual state power, obviously exerted for legitimate and important purposes, must fail because of the demands of the Commerce Clause. We do not deem it necessary or useful to retrace in any particular detail the history of the negative implications of the Commerce Clause or the manner in which this body of doctrine has evolved through successive decisions of the Supreme Court. Dicta in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 209, 6 L. Ed. 23 (1824) suggested that the intent of this grant of power to Congress had been to exclude entirely concomitant action on the part of the states. At least, however, since *Cooley v. Board of Wardens, supra*, 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851), it has been clear that state legislation will not necessarily be deemed unconstitutional simply because it can be shown that it may have some impact upon commerce that is interstate in nature. Over the years the Supreme Court has applied various tests and has adopted differing approaches in its treatment of the problem as to whether particular state legislation [474] does or does not fall within the interdict of this provision.

In 1938, in the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510,

82 L. Ed. 734, the Court considered a South Carolina statute that had established size and weight limits for trucks using state highways. The result of enforcing the statute was to exclude many vehicles coming from other states that were engaged in interstate commerce. The Court found that the statute did not violate the Commerce Clause. In commenting upon this case, Professor Engdahl recently observed,

> [T]he court now [in *Barnwell*] formulated better than had been articulated before the test of the negative implications of the commerce clause. In Stone's words, the court is to inquire "whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means or regulation chosen are reasonably adapted to the end sought." 303 U. S. at 190 [58 S. Ct. 510]. [*Engdahl, Constitutional Power: Federal and State* (1974) § 11.03, p. 272]

In addressing the first of these criteria– whether the state legislature has acted within its province–at least two subordinate issues demand attention: can it be said that the subject matter of the legislation has been preempted by Congress, and is the enactment a valid and proper exercise of the state's police power. It was probably implicit in *Barnwell*, as it has been explicit in both earlier and later decisions, that state legislation must also meet a third test –whether the burden imposed on interstate commerce by the state statute exceeds or outweighs the benefit accruing to the state. Recent commentators have questioned whether this third "weighing" test should be, or will continue to be, applied. *Engdahl, op. cit. supra*, § 11.08, pp. 290-94; *Note*, 45 *Univ. of Col. Law Rev.* 487, 489 (1974).

In any event it seems clear that it has not yet been entirely abandoned. *Pike v. Bruce Church,* 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174, 178 (1970). *But see Brotherhood of Loco-* [475] *motive Firemen & Enginemen v. Chicago, Rock Island & Pacific R. R.,* 393 U. S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968).

In the case before us it is evident that the New Jersey Legislature—and the agencies that adopted implementing regulations—were looking to the accomplishment of a wholly legitimate end well within their competence. In seeking to prolong the useful lifespan of landfill areas within the state they were ministering to the needs of public health as well as endeavoring to preserve the environment. As we have indicated, there has very clearly been no federal preemption and the legislation is certainly an appropriate exercise of the state's police power. *Cf. Oxford Consumer Discount Co. of North Philadelphia v. Stefanelli,* 102 N. J. Super. 549, 567-574, 246 A. 2d 460 (App. Div. 1968), modified, 104 N. J. Super. 512, 250 A. 2d 593 (App. Div. 1969), further modified, 55 N. J. 489, 262 A. 2d 874 (1970). Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. Less than total exclusion of solid waste generated outside New Jersey would have been of no avail. Even the means that have been adopted—apparently the best available—offer no certainty of providing more than much needed time within which to devise by technological effort and ingenuity a satisfactory ultimate solution. Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create

commercial restrictions. Nor is there any real or significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state.

The further step in the testing process would require us to assay the burden on interstate commerce and to weigh it against [476] the benefit to the state. The burden is slight indeed. There is nothing to indicate that adequate alternatives are not available in both New York and Pennsylvania. The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks. When balanced against the dangers to public health and to the environment that this legislation seeks to avert, these relatively small costs and modest inconveniences seem minor indeed.

Other state and federal courts in very recent years have not hesitated to sustain legislation having as its aim the protection of health and the maintenance of environmental values and natural resources against attacks based upon alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Commission,* 15 Or. App. 618, 517 P. 2d 691 (1973) (ban on non-returnable beverage containers); *Proctor & Gamble Co. v. City of Chicago,* 509 F. 2d 69 (7th Cir. 1974), *cert. denied* 421 U. S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Improvement Commission,* 307 A. 2d 1 (Sup. Jud. Ct. Me. 1973), appeal dismissed, 414 U.S. 1035, 94

S. Ct. 532, 38 L. Ed. 2d 326 (1973) (prevention and control of marine oil spillage); *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F. 2d 897 (9th Cir. 1975) (ban on further building).[13]

We know that not every hindrance to interstate commerce that may result from a state law will be deemed sufficient to invalidate the legislation. We know too and are constantly becoming more acutely aware that the environmental resources as well as ecological and human values that have [477] become so endangered upon this "plundered planet," insistently demand every reasonable protection that can possibly be recruited.

In this area the state has not only a right to protect its own resources, but also the duty to do so, in the interest of its citizens, as well as others. We are not here concerned with the problem presented in such cases as *West v. Natural Gas Co.*, 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) and *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). There the Court was called upon to review state statutes restricting the flow of natural gas to citizens of the state in question. Quite understandably it was found that the enactments did violence to the Commerce Clause. In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic. We know that there resides in each of the severel states a power to protect its natural resources. This power is part of what has been called its quasi-sovereignty. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907), the

13. A similar legislative ban on the importation of waste materials has been enacted in the State of Maine. See *Maine Rev. Stat. Ann. Title* 17, § 2253 (Supp. 1974-75).

Supreme Court entertained an original action by the State of Georgia, in which the latter sought to restrain an out-of-state manufacturer from permitting deleterious fumes to be blown into the plaintiff state and do damage to trees, fields and crops. In determining that an injunction would issue, practically as of right, Justice Holmes said,

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. [478] It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. [206 U. S. at 237, 27 S. Ct. at 619, 51 L. Ed. at 1044]

It is true that there the Court dealt with a nuisance, which is not present here. Yet, the case has relevant import. The protection to its environment and natural resources that a state can demand of right from a federal court should be equally available to it by way of protective legislation. We do not mean to be understood as saying that every assertion of a state's quasi-sovereign right to protect its environment, ecological values and natural and human resources will be sustained regardless of the impact upon interstate commerce. Clearly this is not so. But where the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values

sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action.

The judgments of the respective trial courts are hereby reversed; all stays or injunctive orders are vacated.

For affirmance in both cases: Chief Justice HUGHES, Justices MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD and Judge COLLESTER—6.

For reversal: None.

APPENDIX B.

SUPREME COURT OF NEW JERSEY
M-434 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further

ORDERED that this Court does not retain jurisdiction.

WITNESS, the Honorable Richard J. Hughes, Chief Justice at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE,
Clerk.

APPENDIX C.

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER

A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
Docket No. L-15068-73 P.W.
Civil Action

CITY OF PHILADELPHIA, etc, et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ORDER

This matter being opened to the Court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs, Herbert F. Moore, Esq. appearing, in the presence of Stephen L. Skillman, Esq., Assistant Attorney General of the State of New Jersey, attorney for defendants, and Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors, and good cause being shown,

It is on this 19th day of December, 1975:

ORDERED, that Counts II, III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII contained in plaintiffs' complaint in lieu of prerogative writs filed in the above captioned matter are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that Counts Two, Three, Four, Five, Six, Seven and Eight of the amended complaint filed by plaintiffs-intervenors in the above captioned matter, are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VIII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter.

GEORGE Y. SCHOCH, J. S. C.

William F. Hyland, Attorney General of New Jersey
Attorney for Defendants

By: STEPHEN SKILLMAN
Assistant Attorney General

Consent as to form and entry.
JAMIESON, McCARDELL, MOORE, PESKIN and SPICER, *A Professional Corporation*
Attorneys for Plaintiffs

By: ARTHUR MEISEL
VINCENT J. DOTOLI,
Attorney for Plaintiff-Intervenors

APPENDIX D.

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, reversing the trial court's declaration that P. L. 1973, c. 363 unconstitutionally discriminates against interstate commerce, entered in this action on November 18, 1975.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

JAMIESON, McCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation
Counsel for Appellants
by: HERBERT F. MOORE

Dated: January 8, 1976

CERTIFICATE OF SERVICE.

I hereby certify that on this 9th day of January, 1976, a copy of the Notice of Appeal was mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, to Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080, and to David N. Samson, Esq., attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052.

I further certify that all parties required to be served have been served.

HERBERT F. MOORE.
Herbert F. Moore.

APPENDIX E.

Chapter 363 Laws of N. J. 1973
Approved January 2, 1974.

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 12, 1973

By Senators WALLWORK, HAGEDORN and HIRKALA

(Without Reference)

AN ACT to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

2. No person shall bring into this State any solid or liquid waste which originated or was collected outside the

territorial limits of the State, "*except garbage to be fed to swine in the State of New Jersey,*" until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973, c. 39.

3. This act shall take effect on the first day of the first month following its enactment.

APPENDIX F.

Filed January 22, 1974.

JAMIESON, WALSH, MCCARDELL, MOORE & PESKIN
A Professional Corporation
One West State Street
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(609) 396-5511
Attorneys for Plaintiffs.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
DOCKET No. L 15068.73 P. W.
Civil Action

CITY OF PHILADELPHIA, a municipal corporation of the Commonwealth of Pennsylvania, CITY OF GLEN COVE, a municipal corporation of the State of New York, LANDFILL AND DEVELOPMENT COMPANY, a New Jersey corporation, MAC SANITARY LANDFILL, INC., a New Jersey Corporation, KINSLEY'S LANDFILL, INC., a New Jersey corporation, and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a New Jersey Corporation,
Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants.

COMPLAINT
IN LIEU OF PREROGATIVE WRITS.

Plaintiffs, City of Philadelphia, c/o David J. Damiano, Commissioner, Department of Streets, 340 Municipal Services Building, Philadelphia, Pennsylvania, 19107, City of Glen Cove, c/o David Quient, Esq., City Attorney, 5 Highland Road, Glen Cove, New York, 11542, Landfill and Development Company, Route 38, R. D. #1, Mt. Holly, New Jersey, M. A. C. Landfill, Inc., Routes 41 and Clements Bridge Road, Deptford, New Jersey, Kinsley's Landfill, Inc., Routes 41 and 47, Deptford, New Jersey and DeLorenzo-Insterstate Waste Removal Co., Inc., 208 Paterson Avenue, Trenton, New Jersey, in complaining against defendants, say:

COUNT I.

1. Plaintiff landfills are public utilities of the State of New Jersey and hold duly issued temporary certificates of public convenience and necessity issued by the New Jersey Public Utility Commission.

2. Each said landfill duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a sanitary landfill registration certificate pursuant to N. J. A. C. 7:26-2.2 &c.

3. Plaintiff Landfill and Development Company operates a sanitary landfill on a tract of land consisting of approximately 200 acres situated in the Townships of Mount Holly, Eastampton and Lumberton in the County of Burlington and State of New Jersey, which landfill site has been leased from plaintiff DeLorenzo-Interstate Waste Removal Co., Inc.

4. Plaintiff M. A. C. Landfill, Inc. operates a sanitary landfill on a tract of land consisting of approximately 87 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

5. Plaintiff, Kinsley's Landfill, Inc., operates a sanitary landfill on a tract of land consisting of approximately 380 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

6. Each landfill treats and disposes of solid waste which originated or was collected outside the State of New Jersey, including considerable solid waste collected in the City of Philadelphia, Pennsylvania.

7. Plaintiff City of Philadelphia has entered into a written agreement with each of the aforesaid plaintiff landfills for the treatment and disposal of a substantial portion of its sold waste. Plaintiff City of Glen Cove disposes of a substantial portion of the solid waste originating or collected in said city in sanitary landfills located in the State of New Jersey.

8. By virtue of the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 *et seq.*, the Department of Environmental Protection of the State of New Jersey was granted the power and authority to promulgate rules and regulations governing solid waste disposal in the State of New Jersey.

9. On February 21, 1973, the Governor of the State of New Jersey approved A. 1132 (P. L. 1973, c. 39) known as the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

10. Said Act, which became effective March 1, 1973, is entitled as follows:

> AN ACT to control and regulate the treatment and disposal within this State of solid and liquid waste collected outside the State, empowering the Commissioner of Environmental Protection to adopt rules and regulations and prescribing penalties for violations.

11. Pursuant to paragraph 4 of the Waste Control Act, the Commissioner of Environmental Protection is granted the power to prohibit "the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State". N. J. S. A. 13:1I-4a.

12. In accordance with the authority conferred by N. J. S. A. 13:1E-1 *et seq.* and N. J. S. A. 13:1I-1 *et seq.*, and as part of a proposed Revision to the Rules of the Bureau of Solid Waste Management, the Commissioner of Environmental Protection proposed as follows:

7:26-1.8 *Out of State Waste*

—1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

—1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

13. The effect of the aforesaid portion of the proposed rule is to completely prohibit the disposal in the State of New Jersey of any solid waste which originated or was collected outside the territorial limits of the State.

14. The principal basis and background advanced by the Department of Environmental Protection to support the proposed prohibition was to assure the availability of landfill acres in New Jersey for solid waste generated in this State, and was an incident thereto, to stabilize the cost of solid waste collection and disposal for New Jersey residents.

15. The power and authority to regulate the rates and public utility aspects of the solid waste collection and disposal industry has been conferred upon the Board of Public Utility Commissioners pursuant to the Solid Waste Utility Control Act of 1970, N. J. S. A. 48:13A-1 *et seq.*

16. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and an unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

17. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State; and there is no difference with respect to the treatment or disposal of same.

18. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 hereof, if adopted and enforced, would be and constitute an undue burden upon interstate commerce in violation of Art. 1, Sec. 8., Cl. 3 of the United States Constitution.

19. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

20. Plaintiffs will suffer immediate and irreparable injury, loss or damage if the proposed rule prohibiting the importation of out-of-state waste set forth in paragraph 12 hereof is adopted and enforced.

21. In the event plaintiff landfills are prohibited to dispose of solid waste which originated or was collected outside the territorial limits of this State, the continued operation of said sanitary landfills may be and become economically unfeasible, thereby impairing the public interest.

22. Plaintiffs must obtain equitable relief because they do not have an adequate remedy at law.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT II.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out of state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT III.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on the face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and

successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT V.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 4, Sec. 7, Par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C.-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an arbitrary, capricious and unreasonable exercise of power by an administrative agency, thereby denying plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed

rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive of the First Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. The New Jersey Legislature has conferred sweeping authority upon appropriate public bodies to regulate the treatment and disposal of solid waste in New Jersey, for the purpose of assuring a sanitary method of disposing of solid waste and thereby protecting the public health, safety and welfare.

3. N. J. S. A. 26:1A7 provides, in part, that the Public Health Council, established within the Department of Health of the State of New Jersey, shall have power to establish reasonable sanitary regulations, and that the body of regulations so established shall be called the State Sanitary Code.

4. By virtue of said authority and in accordance with the applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, a revision of Chapter VIII of the State Sanitary Code, exclusively concerned with refuse disposal, was adopted by the Public Health Council to become effective July 1, 1970.

5. Section 6 of the Solid Waste Management Act (1970) N. J. S. A. 13:1E-6b provides, in pertinent part, as follows: "All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department (of environmental protection), subject to its power as herein provided to amend or repeal the same."

6. By virtue of the authority granted by the applicable provisions of the Solid Waste Management Act (1970), (N. J. S. A. 13:1E-1 *et seq.*) and the Waste Control Act (N. J. S. A. 13:1I-1 *et seq.*) and in accordance with applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, the Department of Environmental Protection held hearings in two parts during December, 1973 on proposed solid waste management regulations.

7. Said proposed regulations do not expressly amend or repeal Chapter VIII of the State Sanitary Code.

8. In addition to the aforesaid, N. J. S. A. 13:1E-17, being a supplement to the Solid Waste Management Act (1970) provides, in pertinent part, as follows: "No ordinances or regulations of any governing body of a municipality or county or board of health more stringent than this act or any rules or regulations promulgated pursuant hereto, and relating to health and environmental protection aspects of solid waste collection or solid waste disposal, shall be superseded by this act."

9. A similar provision with respect to the provisions of the State Sanitary Code was enacted in 1947, N. J. S. A. 26:1A-9.

10. On January 2, 1974, the Governor of the State of New Jersey approved S. 2367 (P. L. 1973, c. 363) being a

supplement to the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

11. Said Act, which will become effective February 1, 1974, is entitled as follows:

> An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).-

12. The text of said Act provides as follows:

> (1) The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatement and disposal within this State of all wastes generated outside of the State be prohibited.
>
> (2) No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973, c. 39.

13. In enacting a law prohibiting the importation of out-of-state waste, the principal concern of the New Jersey Legislature was to preserve landfill acres in New Jersey for solid waste generated in this State.

14. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within this State; and there is no difference with respect to the treatement or disposal of same.

15. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and the unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

16. Inasmuch as the disposal of solid waste is a problem of national scope and concern, the Congress of the United States has directed the Secretary of Health, Education and Welfare to encourage interstate and interlocal cooperation in connection with solid waste disposal problems. 42 U. S. C. A. § 3254.

17. P. L. 1973, c. 363 constitutes an undue burden upon interstate commerce in violation of Art. 1, Sec. 8, Cl. 3 of the United States Constitution.

18. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

19. Plaintiffs repeat the allegations contained in paragraphs 20 through 22 inclusive of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IX.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive, and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes the taking of private property for public use without just compensation in violation of Amendment 5 and Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT X.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363, constitutes the taking of private property for public use without just compensation in viclation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contracts, in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contract in violation of Art. 4, Sec. 7, par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Inasmuch as more than one object is embraced by P. L. 1973, c. 363, said enactment violates Art. 4, Sec. 7, Par. 4 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Section 2 of P. L. 1973, c. 363 contains an unconstitutional delegation of legislative power in violation of Amendment 14 of the United States Constitution, and Art. 4, Sec. 1, Par. 1, of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is so vague and uncertain as to deny plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is violative of due process of the law as constituting an arbitrary, capricious and unreasonable exercise of power by the Legislature, as provided in Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is void for failure to provide adequate standards to an administrative agency in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIX.

1. N. J. S. A. 13:1I-4a provides as follows:
The commissioner shall have the power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.

2. The power to prohibit, as distinguished from the power to regulate, the incineration or landfill of solid waste and the treatment or disposal of liquid waste has been preempted by the federal government.

WHEREFORE, plaintiffs demand judgment:

a. Declaring the grant of power to prohibit the treatment or disposal of solid and liquid waste contained in N. J. S. A. 13:1I-4a unconstitutional.

b. That this Court grant costs of suit; and

c. That such other relief be granted by the Court as seems to it just and equitable.

Jamieson, Walsh, McCardell, Moore & Peskin
A Professional Corporation
By /s/ HERBERT F. MOORE
Herbert F. Moore

APPENDIX G.

Affidavit of Richard A. Peluso, Dated January 16, 1974.

A Professional Corporation
JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed almost all course work toward a doctor's degree in said field.

3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

5. As a general rule, there is a direct relationship between the length of time consumed in bringing a sanitary landfill to final grade including placement of the final impermeable cover thereon, and the potential for environmental pollution.

6. If the effect of P. L. 1973, c. 363, or proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 is to reduce the volume of solid waste treated and disposed of in New

Jersey and thereby extend the time within which landfills are brought to final grade and final cover then such statute and proposed rules may have the effect of increasing, rather than decreasing such danger as may exist to the quality of the environment.

7. In the event the court would grant restraints enjoining the enforcement of P. L. 1973, c. 363, or the adoption or enforcement of proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, the public health, welfare and safety would in no way be jeopardized provided said waste continued to be treated and disposed of in accordance with the terms of applicable Federal and New Jersey state and administrative laws, rules and regulations.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 16th day of January, 1974.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

APPENDIX H.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

RICHARD W. DEKORTE
Counsel to the Governor

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 18, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Counsel to the Governor

Encl.
cc: Richard J. Sullivan, Commissioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

APPENDIX I.

JAMIESON, WALSH, McCARDELL,
MOORE and PESKIN
A PROFESSIONAL CORPORATION
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION
Docket No. L-15068-73 P. W.
CIVIL ACTION

CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa., CITY OF GLEN COVE, a municipal corp. of the State of N. Y., LANDFILL and DEVELOPMENT COMPANY, a N. J. corp., MAC SANITARY LANDFILL, INC., a N. J. corp., KINSLEY'S LANDFILL, INC., a N. J. corp. & DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corp.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Cor-

poration, by Arthur Meisel, Esquire, attorneys of the plaintiffs, notice having been informally given to the Office of the Attorney General of New Jersey, and it appearing to the Court from the duly verified complaint and the affidavits annexed thereto that immediate and irreparable damage will probably result to the plaintiffs before a hearing can be had on an application for a temporary restraining order in this action:

It is on this 21st day of January, 1974,

ORDERED, that the defendants show cause before the Superior Court, Law Division, at the Mercer County Court House, South Broad and Market Streets, Trenton, N.J. on the 1st day of February, 1974 at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard why an injunctive order should not be issued restraining and enjoining the defendants according to the demand of the complaint until the final hearing of this action.

IT IS FURTHER ORDERED, that the defendant, Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management and that the State of New Jersey desist and refrain from enforcing the provisions of P. L. 1973, c. 363 until the constitutionality of same has been determined, and that said restraints apply to defendants and their agents, employees, servants and attorneys.

IT IS FURTHER ORDERED, that the defendants have leave to move for a dissolution or modification of the restraints hereby imposed on 2 days notice to the plaintiffs.

IT IS FURTHER ORDERED, that true but uncertified copies of the complaint and the affidavits attached thereto and of this order be served upon the defendants within 2 days from the date hereof.

GEORGE Y. SCHOCH

J. S. C.

APPENDIX J.

SUBCHAPTER 4. IMPORTATION OF SOLID AND LIQUID WASTE FROM OUTSIDE NEW JERSEY

Authority

Unless otherwise expressly noted, all provisions of this Subchapter were adopted pursuant to authority delegated at Chapter 363 of the Public Laws of 1973 and were filed January 18, 1974, as R. 1974 d. 10 to become effective February 1, 1974. See: 6 N. J. R. 58(a).

7:1-4.1 Definitions

The following words and terms, when used in this Subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"Bulk liquid" or "bulk semi-liquid" means liquid or semi-liquid in the quantity of 55 gallons or more.

"Chemical waste" means discarded material resulting from any manufacturing process or other procedure which is or can become chemically active.

"Department" means the Department of Environmental Protection.

"Hazardous waste" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms, because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause detrimental cumulative effects. They shall include waste materials that are:

1. Toxic or poisonous;

2. Corrosive;

3. Irritating or sensitizing;

4. Radioactive;

5. Biologically infectious;

6. Explosive;

7. Flammable; and

8. Present a significant hazard to human health and/or the environment. They include, but are not limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 91-596) and those listed in Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

"Liquid waste" means any waste which exists in the liquid state at standard conditions (70 degrees Fahrenheit and 29.92 in hydrargyrum).

"Pesticide" means any substance or mixture of substances labeled, designed, intended for or capable of use in preventing, destroying, repelling, sterilizing or mitigating any insects, rodents, nematodes, predatory animals, fungi, weeds and other forms of plant or animal life or viruses, except viruses on or in living man or other animals. The term "pesticide" shall also include any substance or mixture of substances labeled, designed or intended for use as a defoliant, desicant or plant regulator.

"Recycling or reclamation facility" means any place, equipment, or plant designed or operated to collect, store or process and to redistribute separated materials so as to return the material to the raw materials market.

"Resource recovery facility" means any place, equipment, or plant designed and operated to separate or process municipal solid waste into usable secondary materials, including fuel and heat.

"Secondary material" means previously used raw material.

"Semi-liquid" mean solid matter in a liquid media (for example, a slurry).

"Solid waste" means garbage refuse, sludge and other discarded solid materials resulting from industrial, commercial and agriculture operations and from community activities, and all other waste materials including liquids disposed of incident thereto except solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare and feed such wastes to swine on their own farms.

7:1-4.2 Out-of-State waste

(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

1. Garbage to be fed to swine in the State of New Jersey;

2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be

separated or processed into usable secondary materials; and

4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

7:1-4.3 Effective date

These rules shall take effect on February 1, 1974.

APPENDIX K.

Filed February 5, 1974

JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
A Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
Docket No. L-15068-73 P. W.

CIVIL ACTION

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Herbert F. Moore, Esq., attorneys for plaintiffs, and in the presence of Joseph M. Clayton, Jr., Deputy Attorney General of the State of New Jersey, attorney for defendants, and the Court having considered the complaint and affidavits attached thereto and the answer filed on behalf of the defendants, and having heard the arguments of the respective counsel, and being satisfied that the plaintiffs are entitled to an order restraining defendants as demanded.

And it appearing that the Order to Show Cause made on the 25th day of January, 1974 has been duly served as therein directed,

It is on this 1st day of Febr., 1974,

ORDERED, that the State of New Jersey shall desist and refrain from enforcing the provisions of P. L. 1973, c. 363;

IT IS FURTHER ORDERED, that Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from enforcing N. J. A. C. 7:1-4;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from adopting any rule or administrative order, of any nature or description, which would prohibit the treatment or disposal in New Jersey of solid waste collected or originating in another state, or which would prohibit transportation of such waste into this state for disposal purposes;

IT IS FURTHER ORDERED, that the restraints contained herein shall apply to the aforesaid defendants and their agents, employees, servants and attorneys until the further order of this Court.

/s/ GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

APPENDIX L.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove, a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp., Kinsley's Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT.

DISTRICT OF COLUMBIA } *ss.:*

ARSEN J. DARNAY, of full age, being duly sworn according to law, deposes and says:

1. I am the Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency.

2. The statements on the attached letter to Mr. Herbert F. Moore dated January 29, 1974 are all true to my personal knowledge.

ARSEN J. DARNAY
Arsen J. Darnay

Sworn to and Subscribed before me this 29 day of January, 1974.

A. BLAKEMAN EARLY
A. Blakeman Early
Attorney at Law of the District of Columbia

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D. C. 20460

Mr. Herbert F. Moore, Esq.
Jamieson, Walsh, McCardell, Moore and Peskin
One West State Street
Trenton, New Jersey 08608

Dear Mr. Moore:

In connection with current litigation in which you are engaged with the State of New Jersey, you have requested a statement of this Agency's position on the legislative action by the State of New Jersey which will prohibit as of February 1, 1974, the importation into the State of any solid or liquid waste originating or collected outside the State. I understand also that the State has adopted under its emergency procedures implementing regulations which with some narrow exceptions, will ban importation for land disposal of any such waste. Thus, it would appear that the treatment and disposal within New Jersey of most wastes generated outside the State will be illegal and subject to severe enforcement penalties as of February 1, 1974.

It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitious passage and implementation of this statute and these regulations.

If this statute and implementing regulations are allowed to become effective February 1, the City of Philadelphia would significantly increase and continue the incineration of its solid waste. The incineration of such quantities of solid waste would result in the emission of particulate matter in violation of health related air quality standards and the Clean Air Act of 1970. (See Affidavit of Mr. David J. Damiano, Commissioner of Streets, City of Philadelphia, page 3.)

Representatives of EPA have testified on two occasions on other proposals to ban the importation and disposal in New Jersey of out-of-state wastes. Copies of the statements of Meyer Scolnick before the Hackensack Meadowlands Development Commission on June 18, 1973, and of John A. Ruf before the New Jersey Department of Environmental Protection on December 13, 1973, are enclosed. These statements, together with this letter, represent the position of the Environmental Protection Agency. Copies will be distributed to the State and to others who have expressed an interest in this matter.

In brief, EPA's position is that a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act, the administration of which law is an EPA responsibility. The EPA Administrator is charged with encouraging (1) cooperative activities by the States and local governments in connection with solid waste disposal programs; (2) interstate, inter-local, and regional planning for, and the conduct of, interstate, inter-local and regional waste disposal programs; and (3) the enactment of improved and, so far as practical, uniform state and local laws governing solid waste disposal. The New Jersey legislation will work at cross purposes with the plans and goals EPA is striving to implement under the role given to it by the Solid Waste Disposal Act. Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number

of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

While the concerns of the several States as to the growing scarcity of landfill disposal sites are understandable, restrictions on out-of-state wastes reflect a narrow, parochial view without due regard to more significant problems and values involved in the national policy in favor of regional planning for solid waste disposal consistent with the achievement of environmental quality goals on a regional basis in this and the related environmental areas in which EPA is making efforts to combat water pollution under the Federal Water Pollution Control Act Amendments of 1972 and air pollution under the Clean Air Act. Environmental planning in the opinion of this Agency means regional planning and not restrictive legislation by a jurisdictional entity in its own short-range self interest. This means that solid waste processing and disposal facilities should be planned, designed and constructed so as to serve "waste sheds" which may encompass more than one city or State, and not merely the jurisdictional entity in which it is located or in which the waste is generated.

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

The control of available landfill sites development in light of land use planning as reflected in State laws, regulations and policies in such areas as "wetlands" preservation, area development (such as in the Hackensack Meadowlands), open-space, recreational, agricultural and

park area designations and zoning and growth development planning are admirable efforts of environmental control provided such efforts take into account the total environmental picture and address the significant problems of air quality, water quality, waste water treatment as well as solid waste treatment and disposal. A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices.

Sincerely yours,

ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator
for Solid Waste Management Programs
(HM-562)

APPENDIX M.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

By: Joseph M. Clayton, Jr.
Deputy Attorney General
(609) 292-6597

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc. et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ANSWER

Defendants, by way of answer to the complaint in the above captioned matter, say:

COUNT 1.

1. The allegations contained in Paragraphs 1 through 6 of the First Count of the Complaint are admitted.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the First Count of the Complaint.

3. The Solid Waste Management Act referred to in Paragraph 8 of the First Count of the Complaint speaks for itself.

4. The allegations contained in Paragraph 9 of the First Count of the Complaint are admitted.

5. With respect to the allegations contained in Paragraphs 10 and 11 of the First Count of the Complaint, the Waste Control Act (L. 1973, c. 39) speaks for itself.

6. Defendants admit the allegations contained in Paragraphs 12, 13 and 14 of the First Count of the Complaint; however, said regulations (N. J. A. C. 7:26-1.8.1 and 1.8.2) have been superseded by L. 1973, c. 363, and said regulations will not be adopted by the Department.

7. The Solid Waste Utility Control Act referred to in Paragraph 15 of the First Count of the Complaint speaks for itself.

8. The allegations contained in Paragraph 16 of the First Count of the Complaint are denied.

9. The allegations contained in Paragraph 17 of the First Count of the Complaint are admitted.

10. The allegations contained in Paragraph 18 of the First Count of the Complaint are denied.

11. The allegations contained in Paragraph 19 of the First Count of the Complaint are denied.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the First Count of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the First Count of the Complaint.

14. The allegations contained in Paragraph 22 of the First Count of the Complaint are denied.

COUNT 2.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Pragraph 2 of the Second Count of the Complaint are denied.

COUNT 3.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Third Count of the Complaint are denied.

COUNT 4.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourth Count of the Complaint are denied.

COUNT 5.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifth Count of the Complaint are denied.

COUNT 6.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixth Count of the Complaint are denied.

COUNT 7.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventh Count of the Complaint are denied.

COUNT 8.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraphs 2 through 12 of the Eighth Count of the Complaint are admitted, except that the various laws of the State of New Jersey referred to in said allegations speak for themselves.

3. Defendants admit that the preservation of additional landfill acres for solid waste generated in New Jersey was one of the reasons for the enactment of a ban on the disposal in New Jersey of waste originating outside the State.

4. The allegations contained in Paragraph 14 of the Eighth Count of the Complaint are admitted.

5. The allegations contained in Paragraph 15 of the Eighth Count of the Complaint are denied.

6. The laws of the United States, specifically 42 U. S. C., § 3254, speak for themselves.

7. The allegations contained in Paragraph 17 of the Eighth Count of the Complaint are denied.

8. The allegations contained in Paragraph 18 of the Eighth Count of the Complaint are denied.

9. Defendants repeat their answers to the allegations contained in Paragraphs 20 through 22 of the First Count of the Complaint and incorporate same herein by reference.

COUNT 9.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Ninth Count of the Complaint are denied.

COUNT 10.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Tenth Count of the Complaint are denied.

COUNT 11.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eleventh Count of the Complaint are denied.

COUNT 12.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Twelfth Count of the Complaint are denied.

COUNT 13.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Thirteenth Count of the Complaint are denied.

COUNT 14.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourteenth Count of the Complaint are denied.

COUNT 15.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifteenth Count of the Complaint are denied.

COUNT 16.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixteenth Count of the Complaint are denied.

COUNT 17.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventeenth Count of the Complaint are denied.

COUNT 18.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eighteenth Count of the Complaint are denied.

COUNT 19.

1. N. J. S. A. 13:1I-4(a) speaks for itself.

2. The allegations contained in Paragraph 2 of the Nineteenth Count of the Complaint are denied.

FIRST SEPARATE DEFENSE.

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE.

To the extent that the complaint constitutes a challenge to the administrative regulations adopted by the Department of Environmental Protection, the Superior Court, Law Division, lacks jurisdiction over the subject matter thereof.

THIRD SEPARATE DEFENSE.

The enactment of L. 1973, c. 363 has superseded the proposed regulations referred to in the complaint as

N. J. A. C. 7:26-1.8.1 and 1.8.2. The Department has indicated its intent to not adopt those proposed regulations. Thus the allegations with respect to those regulations are moot.

FOURTH SEPARATE DEFENSE.

Plaintiffs have failed to exhaust their administrative remedies.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

I hereby certify that the within pleading has been served within the time prescribed by Rule 4:6.

JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

APPENDIX N.

RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT
N. J. A. C. 7:26-1 et seq.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
David J. Bardin, Commissioner

Effective July 1, 1974

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ADOPTION OF RULE REVISION
BUREAU OF SOLID WASTE MANAGEMENT

As Commissioner of the Department of Environmental Protection, in accordance with N. J. S. A. 13:1E-1 et seq., I have promulgated new Rules of the Bureau of Solid Waste Management (N. J. A. C. 7:26-1 et seq.). These rules replace the 1970 Rules known as N. J. A. C. 7:26-1 (formerly Chapter VIII—Refuse Disposal, a chapter of the New Jersey State Sanitary Code, adopted April 30, 1970 by the Public Health Council). The new rules have an effective date of July 1, 1974 and govern disposal, collection/haulage and fees.

Legal notice of the proposed regulations and the public hearing concerning them, as required by law, was given November 8, 1973. The public hearings were held on December 11, 1973, December 13, 1973, January 21, 1974, January 23, 1974, and January 25, 1974, during which eighty-five (85) organizations and private citizens testified. In response to public testimony, 140 out of 335 subsections were altered. Most of the revisions consisted of rewording to clarify the intent of the regulations; some

were made less restrictive because they were found to be more stringent than necessary. No rule was altered in such a way as to provide less protection to the public health, safety or welfare than provided by the Chapter VIII regulations. Richard D. Goodenough, Director of the Division of Environmental Quality solicited opinions from approximately 120 organizations, agencies and individuals (including all 85 who testified at the public hearings) on the draft revisions of May 15, 1974. Nineteen responses were received; four recommended adoption as revised, five recommended adoption with some minor changes, three recommended adoption with more stringent requirements, six recommended major (less restrictive) changes before adoption, and one was against the adoption of any new rules. Nine sub-sections of the May 15th draft have been reworded, three have been deleted and the definition of the word "putrescible" was added.

We do not now adopt the proposed sub-section requiring that, "no registration for a new facility shall be approved which would be in conflict with existing state, county or regional plans", pending further progress on regional solid waste planning. Language with respect to the concept of regionalization and applicability of these rules will be proposed at a later date.

In addition to the need for specific guidelines and criteria concerning regional plans, the thorough public scrutiny given the proposed rules has emphasized the need for additional chapters to be added to these ruies. I expect, therefore, in the coming months, to propose new rules governing water sampling and analytical procedures, pesticide disposal, hazardous waste disposal, the review of environmental assessment statements for solid waste facilities, and rules concerning the disposal of shredded wastes.

An analysis of the cost of the new regulation to New Jersey's taxpayers, prepared by the Solid Waste Industry Council of New Jersey (SWIC), projected an average increase of 200% in the cost of solid waste disposal. SWIC admitted in testimony to the Bureau of Solid Waste Management that their projected increase in cost of 200% was a result of comparing full compliance with the 1974 regulations with the cost of non-compliance with the 1970 regulations. In preparing their analysis, SWIC assumed that all sanitary landfills purchased their soil cover, would be required to install leachate collection and treatment systems and would have to install scales. A more realistic comparison of the differences between Chapter VIII and the new Rules which I have adopted discloses an expected increase in disposal costs of 18 cents per ton (5% rise) and an increase in collection costs of about 2 cents (1/10 of 1%). The cost of solid waste collection and disposal to the average family of three will rise approximately 20½ cents per year (present average rate is $48 annually), with the adoption of these new Rules.

These new Rules will entail an increase of approximately $50,000 in State administrative expenses over the currently budgeted $296,361. The adoption of these rules is expected to generate some $300,000 in fees.

The far greater protection to the lands and waters of this State as a result of the new Rules of the Bureau of Solid Waste Management in my judgement, far out-weighs the small increase in cost which will be incurred.

I consider the promulgation of these rules as an important first step in developing responsible State leadership in the field of Solid Waste Management. Diligent enforcement of this regulation is necessary to protect the public health, safety, and welfare. However, regional solid

waste management program development and implementation including resource recovery is the real answer to New Jersey's solid waste crisis. Development of strategies to establish such a system is a high priority for New Jersey.

DAVID J. BARDIN
David J. Bardin
Commissioner

Approved: 28 June 1974

Filed with Secretary of State: 28 June 1974

STATE OF NEW JERSEY

DEPARTMENT OF ENVIRONMENTAL PROTECTION

DAVID J. BARDIN, Commissioner
P. O. Box 1390
Trenton, N. J. 08625
609 - 292 - 2885

ADOPTION OF REVISION TO RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT

N. J. A. C. 7:26-1 et seq.
Docket No. DEP 021-75-02

David J. Bardin, Commissioner of the Department of Environmental Protection, pursuant to the authority of N. J. S. A. 13:1E-1 et seq. as amended, and N. J. S. A. 13:1D-1 et seq. hereby adopts revisions to Subchapter 7:26-4 of the Rules of the Bureau of Solid Waste Management concerning fees. The Department will hereafter propose and adopt additional revisions to the Rules of the Bureau of Solid Waste Management.

On March 6, 1975, the Department published notice of the proposed revisions to the Rules of the Bureau of Solid Waste Management in the New Jersey Register (7 N. J. R. 101(a), Docket No. DEP 021-75-02). In addition, notification was mailed to landfill operators, registered collectors/haulers, environmental commissions, health officers, municipal mayors and councils, watershed associations, organizations and private citizens.

In the Notice published in the New Jersey Register it was proposed to exempt those landfills operated in a municipality with a population of 10,000 or less and limited to residents hauling their own household refuse. At that time, it was estimated that 74 facilities would fall into this category. Upon re-examination, it was found that only in 6

or 7 communities do residents haul their own household refuse. The rules adopted here exempt from the inspection and regulation fee not only landfills in those communities where the residents haul their own refuse, but also landfills operated in communities with a population of 5,000 or less. In those communities having a population of 5,000 or less, handling only municipal type wastes, the Department is of the opinion that one inspection per year by Department personnel in conjunction with inspection reports by the town engineer would be adequate.

A public hearing was held on March 31, 1975 with the record remaining open for written comments thereto until April 7, 1975. Twenty-five written comments were received in addition to oral testimony presented at the hearing. The groups testifying included representatives of the New Jersey State Chamber of Commerce, the Chemical Manufacturers Association, the Solid Waste Industry Council (SWIC), watershed associations, environmental organizations, and private citizens. A list of those interested respondents who have contributed their thoughts is attached.

The present Rules of the Bureau of Solid Waste Management require a $500 annual fee for registration regardless of the size of the facility or type of waste accepted. There are no additional fees for inspection and regulation.

The rules as hereby adopted reduce the annual registration fee to $50 for all facilities. Inspection and regulation fees are on a sliding scale and are based on the size of the facility as well as the type of waste accepted.

The staff of the Department of Environmental Protection has reviewed all of the comments received. The Department realizes that additional review and study will be necessary prior to promulgation of revisions to the rules dealing with the definition and listing of hazardous waste, the siting and number of monitoring wells, test parameters and interpretation and the costs involved.

However, there is no reason to delay promulgation of the rules dealing with the fee schedule.

These rules will become effective immediately.

DAVID J. BARDIN
David J. Bardin
Commissioner

29 April 1975
Date

Oral Testimony @ Public Hearing—March 31, 1975

1) W. P. Anderson
for: State Chamber of Commerce and the New Jersey Chemical Industry Council of Environmental Commissions

2) Susanna Waterman
for: Sierra Club (NJ Chapter & The South Jersey Group)

3) R. K. Altreuter
for: Exxon Company USA

4) John Surmay
for: The City of Elizabeth

5) William P. Philibar
for: Rollins Environmental Services

6) Ian Walker
for: Stony Brook-Millstone Watershed Association

7) Theodore Schwartz
for: Solid Waste Industry Council of New Jersey

8) Dennis Fenn
Engineering Consultant for: Solid Waste Industry Council

9) David Nalven
for: NJ Manufacturers Association

10) Warren Gragory
for: National Solid Waste Management Association

11) Kenneth DiMuzio
for: Deptford Township Board of Health

12) Lief Sigmund
for: Scientific Chemical Processing Company

13) Betty Little
for: Passaic River Coalition

14) Wallace Coster
for: Nassau Inc.

15) Arthur Albohn
for: The Comline-Sanderson Engineering Corporation of Peapack

16) Peter Larson
for: Upper Raritan Water Association

17) Dr. Marvin Mahan
for: Scientific Inc.

18) Vincent Dotoli
for: John P. Fazzio Landfill Company & Southern Ocean Landfill

Written Testimony

1) Jerry Couvaras
for: Jerry's Cesspool and Septic Tank Service

2) Jan F. VanPeppen Ph.D.
private citizen

3) A. D. Grant
for: S. B. Pennick & Company

4) Lawrence E. Ward, Jr.
for: Garden State Septic Cleaners Association

5) Arthur R. Kobin
for: Browning-Ferris Industries

6) Ann Hunter
for: Solid Waste Advisory Council

7) Fred Hebeler
for: Solid Waste Advisory Council (Dept. of Health)

8) Richard O. Johnson
for: Solid Waste Advisory Council

9) Roger W. Johnson
for: Woodbridge Metropolitan Chamber of Commerce

10) J. H. Rook
for: American Cyanamid Company

11) P. A. Palmer
for: E. I. Du Pont de Nemours & Company

12) W. P. Anderson
for: Tenneco Chemicals

13) Watson B. Smith
for: City of Summit

14) Carlyle W. Crane
for: Plainfield Area Cartman's Association

15) Margaret Sprout
for: Township of Princeton

16) Mrs. Louis Bessire
for: Borough of Princeton

17) Denise E. Reid and H. Philip Minis
for: Princeton Township Environmental Commission

18) John W. Richard, Jr.
for: Atlantic Sanitation Service

19) Mrs. R. O. Rippere, 2nd
for: League of Women's Voters of Monmouth County

20) Joseph M. Smith
for: B. F. Goodrich Chemical Company

21) Gene Laningham
for: Browning-Ferris Industries, Inc.

22) Mary Owen
private citizen

23) Geraghty & Miller, Inc., Port Washington, NY

24) Rossnagel & Associates, Cherry Hill, NJ

25) Marvin Mahan
for: Scientific Inc.

DOCKET No. DEP-021-75-02

NOTICE OF ADOPTION OF AMENDMENTS TO N. J. A. C. 7:26-4
RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT
CONCERNING FEES

Pursuant to N. J. S. A. 13:1E-1 et seq. Commissioner David J. Bardin hereby adopts the following revision in the Rules of the Bureau of Solid Waste Management identified as N. J. A. C. 7:26-1 et seq. The provisions of N. J. A. C. 7:26-4 adopted June 28, 1974, and effective July 1, 1974, are hereby repealed. The following rules are effective as of

7:26-4 RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT CONCERNING FEES.

—4.1 *General*

—4.1.1 In accordance with N. J. S. A. 13:1E-18, there is hereby established a Fee Schedule. Said schedule shall apply to all sanitary landfill operations, incinerators, transfer stations, processing facilities, resource recovery facilities or any other methods of collection or disposal requiring registration with the Department.

—4.2 *Payment of Fees*

Fees shall be paid by certified check or money order and made payable to: Treasurer, State of New Jersey.

—4.3 *Fee Schedule for Solid Waste Facilities*

—4.3.1 Annual Registration Fee	$50
—4.3.2 Fee for Transfer of a Registration	50
—4.3.3 Inspection and Regulation Fee	

Solid Waste Facilities accepting	*Fee per quarter during which wastes are accepted*
Hazardous wastes, non-hazardous bulk liquids, non-hazardous semi-liquids and non-hazardous chemicals (in quantities greater than normally present in municipal refuse and excluding septic tank clean-out waste).	$500
40,000 tons or more of solid waste annually.	500
Between 20,000 and 39,999 tons of solid waste annually.	400
Between 10,000 and 19,999 tons of solid waste annually.	300
Between 6,000 and 9,999 tons of solid waste annually.	200
5,999 tons or less of solid waste annually.	100
Transfer stations and all facilities accepting septic tank clean-out waste only.	50
Facilities Qualifying under –4.8.	0

–4.4 Engineering Design Review (per design). This fee will entitle the registrant to submit or resubmit all information found deficient on the first submission until such time as the approval of the engineering design is granted or denied.

$500

–4.5 Reserved

–4.6 Reserved

–4.7 *Fee Schedule for Collection and Haulage*

–4.7.1 Annual registration, inspection, and regulation:

a. First vehicle $30

b. Each addition vehicle on the same registration 10

–4.7.2 The Registration of a solid waste collection and/or haulage system is non-transferable.

–4.7.3 Fees filed after July 1 shall be as follows:

(a) if initially submitted on or after January 1, be 50% of the full year's registration fee, or

(b) if initially submitted on or after April 1, be 25% of the full year's registration.

Partial fees paid shall only cover the fee requirement until July 1, of the year in which they were paid.

–4.8 *Exemption from Fee Payment*

–4.8.1 Any solid waste facility is exempt from payment of annual registration, inspection, and regulation fees provided that:

The facility is operated solely for the purpose of composting leaf and other vegetative yard wastes; and

The operation of the facility does not require a Certificate of Public Convenience and Necessity issued by the Board of Public Utility Commissioners; and

The annual Updated Registration Statement form (N. J. B. S. W. M. –41) filed with the Department prior to May 1 of each calendar year, is accompanied by a certification, executed by the operator of the facility on forms supplied by the Department, that the facility qualifies under the conditions set forth above.

–4.8.2 A sanitary landfill or transfer station is exempt from payment of inspection and regulation fee (see 4.3.3) provided that:

The operation of the facility does not require a Certificate of Public Convenience and Necessity issued by the Board of Public Utility Commissioners; and

The facility is limited to municipal waste of the residents of the host municipality; and

The solid waste facility is operated in a municipality having a population, based upon the most recent United States decennial census, of 5,000 or less—or—the facility is limited to residents of the host municipality hauling their own household refuse; and

The annual Updated Registration Statement form (N. J. B. S. W. M. –41) filed with the Department prior to May 1 of each calendar year, is accompanied by a certification, executed by the operator of the facility on forms supplied by the Department, that the facility qualifies under the conditions set forth above.

–4.8.3 Fees are not required for any solid waste facility or vehicle whose registrant is an agency of the New Jersey State Government.

–4.8.4 Fees are not required for any solid waste facility whose registrant is the federal government and whose operation is conducted on federal lands. Specifically not exempt are federal vehicles transporting solid waste to a solid waste facility registered with the Department.

–4.8.5 Persons hauling only their own household refuse in vehicles bearing passenger license plates or persons hauling solid waste in vehicles registered with the New Jersey Division of Motor Vehicles as having a maximum gross weight of 5,000 pounds, need not pay a registration fee to the Department.

–4.9 *Time for Submission of Fees*

Fee	*Jul 1*	*Oct 1*	*Jan 1*	*Apr 1*	*Others*
Annual registration (–4.3.1)	X				
Transfer of registration (–4.3.2)					At time of submission of Updated Registration Statement
Inspection and Regulation (–4.3.3)	X	X	X	X	
Engineering Design Review (–4.4)					At time of submission
Collector/Hauler Registration (–4.7.1)	X				

The provisions of N. J. A. C. 7:26-4 adopted June 28, 1974, and effective July 1, 1974, are hereby repealed.

New Jersey Administrative Code

(N. J. A. C.)

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7:26-1 General Provisions of the Rules of the Bureau of Solid Waste Management

—1.1 Scope of Rules

Unless otherwise provided by rules or statute, the following shall constitute the rules of the Bureau of Solid Waste Management and shall govern registration, operation and maintenance of landfill operations in the State of New Jersey, and other methods of solid waste disposal as may be approved by the Department; registration, operation and maintenance of collection and haulage operations in the State of New Jersey and other methods of collection and haulage of solid wastes as may be approved by the Department; a fee schedule for engineering review, registration, and inspection of solid waste disposal and registration of collection, haulage, and disposal operations in the State of New Jersey. These rules shall not apply to:

—1.1.1 The purchase, sale, collection, transport or other handling of separated, recycled or secondary materials exclusively in connection with the processing, recycling or utilization of such materials for re-introduction into industry as raw materials for further processing or use, provided that such materials are free from putrescible matter and are not mixed with other solid or liquid waste as defined herein. Specifically Not exempted are solid waste resource recovery facilities designed or operated for the purpose of separating mixed solid waste into useful secondary materials (including fuel and usable energy).

—1.1.2 Container-pickup facilities as herein defined.

—1.1.3 Garbage to be fed to swine in the State of New Jersey.

—1.1.4 Recycling Centers where individuals or organizations may deposit separated materials such as newsprint, bottles, cans, etc., prior to transport to the secondary materials industry.

—1.1.5 The intra-plant transport, temporary storage or other handling of plant generated waste materials. Specifically Not exempt are those materials to be, or which are, deposited on or in the lands of this state for periods exceeding six months, or which through transport, storage or other handling will cause pollution of the surface or ground waters of this state, or which may pose a substantial or material threat to the public health, safety or welfare.

—1.2 *Construction*

These rules shall be liberally construed to permit the Department and the Bureau of Solid Waste Management to discharge its statutory functions.

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—1.3 *Practice Where Rules Do Not Govern*

The Commissioner may rescind, amend, or expand these rules from time to time, and such rules shall be filed with the Secretary of State as provided by law. In any matter concerning solid waste management that arises not governed by these rules, the Commissioner, the Director or the Bureau Chief shall exercise his discretion within the authority of N. J. S. A. 13:1E-1 et seq.

—1.4 *Definitions*

—1.4.1 *Approved Registration*

The registration of a solid waste disposal site, collector/hauler, or other solid waste facility issued by the Bureau of Solid Waste Management, Department of Environ-

mental Protection, after review and approval of the Registration Statement.

—1.4.2 *Bulk Liquid or Bulk Semi-liquid*

Liquid or semi-liquid which is contained within, or is discharged from, any one vessel, tank or other container which has the capacity of twenty (20) gallons or more.

—1.4.3 *Bulky Waste*

Large items of solid waste which because of their size or weight requires handling other than normally used for municipal solid waste. Bulky waste includes but is not limited to such items as tree trunks, auto bodies, demolition or construction material, appliances, furniture, and drums.

—1.4.4 *Bureau*

The Bureau of Solid Waste Management in the Division.

—1.4.5 *Bureau Chief*

The Chief of the Bureau of Solid Waste Management or any person designated to act on the Chief's behalf.

—1.4.6 *Catch-basin*

A chamber or well, usually built at the curbline of a street, which admits surface water for discharge into a storm water drain.

—1.4.7 *Cell*

Compacted solid wastes that are enclosed by natural soil or cover material in a land disposal site.

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—1.4.8 *Chemical Waste*

A material normally generated by or used in chemical, petrochemical, plastic, pharmaceutical, biochemical or

microbiological manufacturing processes, which has been selected for waste disposal and which is known to hydrolize, ionize or decompose, which is soluble, burns or oxidizes, or which may react with any of the waste materials which are introduced into the landfill, or which is bouyant on water, or which has a viscosity less than that of water or which produces a foul odor. Chemical waste may be either hazardous or non-hazardous.

—1.4.9 *Collection*

The act of picking up solid waste at its point of generation or storage and placing it in a vehicle.

—1.4.10 *Collection Vehicle*

A vehicle (usually a specially designed truck) used in collection.

—1.4.11 *Collector-Hauler*

A person engaged in the act of collection of solid waste and/or transporting such waste between solid waste facilities.

—1.4.12 *Commissioner*

The Commissioner of the Department of Environmental Protection or any other person designated to act on the Commissioner's behalf.

—1.4.13 *Container-Pickup Facility*

A site where one or more containers are located for temporary storage of solid waste at the point of waste generation while awaiting periodic removal to a registered solid waste facility. A container-pickup facility differs from a transfer station (q. v.).

—1.4.14 *Construction Waste*

Waste building material and refuse resulting from construction, remodeling, and repair operations on houses, commercial buildings, pavements, and other structures.

—1.4.15 *Cover Material*

Soil, earth, or other insoluble and non-degradable material approved by the Department which is used to cover compacted solid waste in a sanitary landfill for the purpose of rodent and vector control, to minimize moisture entering the fill, to provide a fire break, and in the case of final cover, to grow vegetation for erosion control. The depth or thickness of cover material is to be measured after compaction with at least one pass of a bulldozer or other suitable equipment having a gross weight in excess of 10,000 pounds.

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—1.4.16 *Daily Cover*

Cover material that is a minimum of six (6) inches in depth.

—1.4.17 *Demolition Waste*

Waste generated from the razing of buildings, factories, and other man-made structures, including streets, roads, and fences.

—1.4.18 *Department*

The New Jersey Department of Environmental Protection.

—1.4.19 *Director*

The Director of the Division of Environmental Quality or any person designated to act on the Director's behalf.

—1.4.20 *Disposal*

The storage, treatment, utilization, processing, or final disposition of solid waste.

—1.4.21 *Disposal Facility*

A solid waste facility used for the disposal of solid waste.

—1.4.22 *Division*

The Division of Environmental Quality in the Department.

—1.4.23 *Dump*

A land site which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers.

—1.4.24 *Engineering Design*

Reports and drawings, including a narrative operating description, prepared by a New Jersey licensed Professional Engineer to describe a solid waste facility and its proposed operation.

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—1.4.25 *Environmental Impact Statement*

A statement as to the probable impact of the proposed solid waste facility upon the air quality, water quality, water supply, hydrology, geology, soils, topography, vegetation wildlife, aquatic organisms, ecology, demographic conditions, land use, aesthetics, history and archeology; a listing of adverse environmental impacts which cannot be avoided; a description of the steps to be taken to minimize adverse environmental impacts during construction and operation both at the project site and in the surrounding region; a listing of alternatives to all or any part of the project with reasons for their acceptability or nonaccept-

ability; and a reference list of pertinent published information relating to the project, the project site and the surrounding region.

—1.4.26 *Existing Solid Waste Facility*

That portion of an active solid waste facility which, as of the effective date of these regulations, possesses a valid approved registration from the Department.

—1.4.27 *Final Cover*

Cover material that is a minimum of twenty-four (24) inches in depth.

—1.4.28 *Free Moisture*

Liquid that drains freely by gravity from solid materials.

—1.4.29 *Generation*

The act or process of producing solid waste.

—1.4.30 *Generator*

The person who causes solid waste to be generated.

—1.4.31 *Ground Water*

That water below ground, the static pressure of which is equal to or greater than prevailing atmospheric pressure; that water present in the saturated zone of an aquifer.

—1.4.32 *Haulage Vehicle*

A vehicle used to transport solid waste between one solid waste facility and another. A transfer vehicle.

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—1.4.33 *Hazardous Waste*

Any waste or combination of waste which poses a present or potential threat to human health, living organisms or the environment. It shall include waste material that is

toxic, corrosive, irritating or sensitizing, radioactive, biologically infectious, explosive, or flammable. It includes but need not be limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 9-596) (OSHA) and those materials listed in the current Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

—1.4.34 *Impermeable Liner*

A layer of natural and/or man-made material of sufficient thickness, density, and composition so as to have a maximum permeability for water of 10^{-7} cm/sec at the maximum anticipated hydrostatic pressure.

—1.4.25 *Infectious Waste*

Includes: (1) equipment, instruments, utensils, and fomites (any substance that may harbor or transmit pathogenic organisms) of a disposable nature from the rooms of patients who are suspected to have or have been diagnosed as having a communicable disease and must, therefore, be isolated as required by public health agencies; (2) laboratory wastes including pathological specimens (i.e., all tissues, specimens of blood elements, excreta, and secretions obtained from patients or laboratory animals) and disposable fomites attendant thereto; (3) surgical operating room pathologic specimens and disposable fomites attendant thereto and similar disposable materials from out-patient areas and emergency rooms.

—1.4.36 *Intermediate Cover*

Cover material that is a minimum of twelve (12) inches in depth.

—1.4.37 *Incinerator*

A thermal device in which solid waste is burned for the purpose of volume reduction (an incinerator used to obtain energy shall be classified as a Resource Recovery Facility—q.v.).

—1.4.38 *Leachate*

Liquid that has been in contact with solid waste and contains dissolved or suspended materials from that solid waste.

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—1.4.39 *Lethal Chemical*

Ammunition, chemical or biological warfare agent, pyrotechnic material and military store of any kind capable of being used in inflict death or harm to man or his environment.

—1.4.40 *Lift*

A compacted layer of solid waste plus its overlying cover material in a sanitary landfill.

—1.4.41 *Municipal Solid Waste*

Residential, commercial and institutional solid waste generated within a community.

—1.4.42 *New Solid Waste Facility*

Any solid waste facility or portion thereof which does not qualify as an existing solid waste facility (q.v.).

—1.4.43 *Open Burning*

Any fire whose products of combustion are emitted directly into the open air, and are not directed thereto through the stack or chimney of an incinerator.

—1.4.44 *Pathological Waste*

See Infectious Waste

—1.2.45 *Person*

Any individual, corporation, company, association, society, firm, partnership, joint stock company or any political subdivision of this State or any agency or instrumentality thereof.

—1.4.46 *Putrescible Waste*

Any waste liable to enter into a state of putrefaction, the typically anaerobic splitting of proteins by bacteria and fungi with the formation of foul-smelling, incompletely oxydized products.

—1.4.47 *Recycling Facility*

Any place, equipment, or plant designed and/or operated to collect, store, process or to redistribute separated waste so as to return the material to market.

—1.4.48 *Registration*

See approved registration.

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—1.4.49 *Registration Statement*

An application for approved registration executed on forms provided by the Bureau and containing such information as may be required.

—1.4.50 *Residue*

Any material that remains after completion of thermal, mechanical or chemical processing.

—1.4.51 *Resource Recovery Facility*

Any place, equipment, device, or plant designed and/or operated to separate or process solid or liquid waste into usable secondary materials, including fuel and energy.

—1.4.52 *Runoff*

The liquid that drains from an area as surface flow.

—1.4.53 *Salvaging*

The controlled removal of waste materials from a solid waste disposal facility for reuse.

—1.4.54 *Sanitary Landfill*

The land disposal site employing an engineered method of disposal of solid waste in a manner that minimizes environmental hazards, including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequent basis.

—1.4.55 *Scavenging*

The uncontrolled removal of solid waste material.

—1.4.56 *Segregation*

The systematic division of solid waste into components.

—1.4.57 *Semi-liquid*

A mixture consisting of solid matter suspended in a liquid media (e.g. a slurry).

—1.4.58 *Septic Waste*

The solid, liquid, or semi-liquid waste removed from septic tanks or cesspools.

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—1.4.59 *Sewage Sludge*

The solid residue consisting of sewage solids combined with water and dissolved materials in varying amount.

—1.4.60 *Solid Waste*

Garbage, refuse, and other discarded materials resulting from industrial, commercial, and agriculture operations

and from domestic and community activities, and shall include all other waste materials including liquids disposed of incident thereto except it shall not include solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare, and feed such wastes to swine on their own farms.

—1.4.61 *Solid Waste Facility*

Any system, site, equipment or building which is utilized for the storage, collection, processing, transfer, transportation, separation, recycling, recovering, or disposal of solid waste.

—1.4.62 *Solid Waste Management*

The purposeful, systematic control of the generation, storage, collection, processing, transfer, transportation, separation, recycling, recovery, and disposal of solid wastes.

—1.4.63 *Storage*

The interim containment of waste after generation and prior to disposal.

—1.4.64 *Surface Water*

A body of water whose top surface is exposed to the atmosphere including a flowing body such as a river, as well as a standing body, such as a pond or lake, whose waters may reach any ground waters or classified surface waters of this state and shall include all waters of this state classified by the Department as FW-1, FW-2, FW-3, TW-1, TW-2, TW-3, CW-1 or CW-2.

—1.4.65 *Toe*

The bottom of the working face or side slope of a land disposal site where deposited solid waste is in contact with virgin ground or previous lift.

—1.4.66 *Transfer Station*

A facility at which solid waste is transferred from collection vehicles to haulage vehicles for transportation to a solid waste facility.

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—1.4.67 *Vector*

An organism, including insects, other arthropods, or rodents, that is capable of transmitting a pathogen from one organism to another.

—1.4.68 *Waste*

Useless, unwanted or discarded solid, semi-liquid, or liquid material.

—1.4.69 *Working Face*

That portion of a land disposal site where solid waste is discharged by a collection and/or haulage vehicle and is spread and compacted prior to placement of cover material.

—1.5 *Repeal of Regulations*

The provisions of the New Jersey Administrative Code 7:26-1 et seq., (formerly Chapter VIII—Refuse Disposal), a chapter of the New Jersey State Sanitary Code, adopted April 30, 1970, by the Public Health Council, to become effective July 1, 1970) are hereby repealed. This repeal shall not affect actions, proceedings, or departmental orders pending or outstanding on the effective date of the new regulation; said actions, proceedings, or departmental orders may be prosecuted, defended and continued in the same manner and to the same effect as if the new regulations had not been adopted. The adoption of these regulations shall not require the alteration of the engineering

design submitted for an existing solid waste facility providing that the implementation of all features contained in that engineering design will not fail to meet the operational requirements contained in these new regulations.

—1.6 *Reserved*

—1.7 *Variance*

Upon written presentation of acceptable evidence that deviation from these rules and regulations will satisfy the intent and purpose of these regulations, a variance may be granted by the Commissioner in accordance with the *Rules of Practice and Procedure for the Bureau of Solid Waste Management*, adopted pursuant to the Administrative Procedure Act (N. J. S. A. 52:14B-1 et seq.).

—1.8 *Reserved*

—1.9 *Penalties*

Penalties for violation of the provisions of these regulations shall be those provided by statute.

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7:26-2 Rules of the Bureau of Solid Waste Management Concerning Disposal

—2.1 *Dumps Prohibited*

—2.1.1 Dumps are hereby declared to be nuisances hazardous to human health and are prohibited.

—2.1.2 The disposal of solid waste in this State shall be made only through use of:

a. Sanitary Landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.

b. Incinerators constructed, operated and maintained in accordance with Regulations of the New

Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.

c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter.

–2.2 *Registration*

–2.2.1 Registration statement: No person shall hereafter engage or continue to engage in disposal of solid waste in this State without first filing a completed registration statement with the Bureau for each disposal facility. The Registration Statement shall be signed by the person engaged in or desiring to engage in solid waste disposal, shall be executed on forms furnished by the Department, and shall state such information necessary and proper for the enforcement of this subchapter as the Department may require. An Engineering Design must be submitted with the Registration Statement.

–2.2.2 Approved registration: No person shall engage in disposal of solid waste in this State without having first obtained Departmental approval of the registration statement required under 2.2.1.

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–2.2.3 Approved engineering design: No new facility shall begin operations without first obtaining Departmental approval of the engineering design submitted with the registration statement; nor shall any existing facility continue to operate subsequent to receiving notice that the Department has disapproved the engineering design for

that facility. Failure to comply with the requirements of this subsection shall be cause for revocation of an approved registration for an existing facility or the denial of registration for a new installation.

–2.2.4 No person shall engage in disposal of solid waste in this state if such an operation does not meet the operational requirements listed in 7:26-2. In addition, each disposal facility must comply with any conditions or limitations which may be specified on the Approved Registration. Approved Registrations are further contingent upon implementation of all features contained in the approved engineering design.

–2.2.5 Prior to May 1, in each calendar year, each registrant shall submit to the Department, a statement updating the information contained in the initial registration statement. This update shall be on forms furnished by the Department. In no case shall submission of an updated statement alter the requirements of 7:26-2.2.4.

–2.2.6 The registrant shall notify the Department in writing within thirty (30) days of any change in status as listed on his current registration statement.

–2.2.7 The failure to submit an update registration statement and to submit all applicable fees (see 7:26-4) on or before July 1 of each calendar year shall be sufficient cause to revoke the approved registration of a solid waste facility.

–2.3 *Domestic Refuse*

The provisions of this subchapter shall not be applicable to disposal of family garbage, yard wastes or family refuse on the premises of one or two family dwellings where the family resides nor shall the provisions of this sub-

chapter be interpreted as permitting disposal of domestic sewage in any manner other than that prescribed by law.

–2.4 *Submission of Engineering Designs*

Designs for Sanitary Landfills, Incinerators and other methods of disposal shall be prepared by a New Jersey licensed professional engineer and submitted to the Bureau for review. The designs shall conform to all rules and regulations for preparation and submission as required and in accordance with the Guidelines and Criteria for Preparation of an Engineering Design as set forth in 7:26-2.12 (as applicable).

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–2.5 *Sanitary Landfill Operational Requirements (General)*

–2.5.1 The width of the working face shall be kept as narrow as is consistent with the proper operation of trucks and equipment in order that the area of waste material exposed during the operating day is minimal. No working face shall exceed one-hundred fifty (150) feet in width when measured across the operating surface of the fill. Except where separate areas are designated on the Engineering Design for specific wastes, no more than one working face shall be in use at any one time.

–2.5.2 All deposited material shall be promptly spread and compacted to a uniform grade by use of equipment sufficient to achieve an inplace density of at least 700 pounds per cubic yard.

–2.5.3 No lift shall exceed twelve (12) feet in height.

–2.5.4 No new sanitary landfill shall be conducted where solid waste is or would be in contact with the surface or

ground waters of this state. This provision shall not apply to non-water soluble, non-decomposable inert solids such as:

(a) earth, rock, gravel, and concrete

(b) asphalt paving fragments

(c) glass

(d) clay and clay or ceramic products

No existing sanitary landfill may continue to deposit solid waste, except those noted in (a), (b), (c) and (d) above where solid waste is or would be in contact with the surface or ground waters of this state.

No new sanitary landfill shall be conducted, nor shall an existing landfill continue to be conducted where the solid waste, in whole or in part, or the leachate produced as a result of the sanitary landfill, impairs the quality of the surface or ground waters of this state to a degree that would degrade the quality of either the surface or ground waters of this state beyond the classification established by the Department for the surface water in question or the potable water standard established by the Department in the case of ground water. In those cases where the natural water quality fails to meet the established standards, the landfill operation shall not aggravate the condition.

–2.5.5 All lifts shall be graded so as to facilitate drainage therefrom. Side slopes and working face shall not exceed a verticle rise of one (1) foot for each horizontal distance of two (2) feet.

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–2.5.6 Control over the scattering of papers and other lightweight materials shall be effected by the use of movable fencing and/or other effective methods.

–2.5.7 Dust control shall be effectively implemented as quired.

–2.5.8 The operation of a solid waste facility shall not result in odors associated with solid waste being detected off site by sense of smell in any area of human use or occupancy.

–2.5.9 Equipment adequate for digging, spreading, compacting and/or covering shall be provided.

–2.5.10 When requested, by a representative of the Bureau or local Board of Health having jurisdiction the operator shall furnish proof that provisions have been made for the repair or replacement of equipment which becomes inoperative. Reasonable effort shall be taken to insure that faulty equipment shall not interfere with the proper operation of the facility and services provided.

–2.5.11 An adequate water supply and/or fire fighting equipment shall be readily available on site or on call to extinguish any and all fires. Fire fighting procedures shall be posted.

–2.5.12 Control of insects, other arthropods, and rodents shall be effected by means of a program directed by a qualified applicator of pesticides in accordance with the New Jersey Pesticide Control Code N. J. A. C. 7:30-1 et seq.

–2.5.13 All exposed surfaces of solid waste shall be covered with daily cover material, or intermediate cover material, or final cover material at the close of each operating day. The exposed surface of solid waste shall not exceed 15,000 square feet, and in no case shall any solid waste be exposed in excess of twenty-four (24) hours.

–2.5.14 No daily cover shall be exposed for any period exceeding twenty-four (24) hours.

–2.5.15 No intermediate cover shall be exposed for any period exceeding six (6) months.

–2.5.16 Final cover material shall be applied to any surface of the fill where the final planned elevation has been obtained, and to all surfaces when the landfill operation is terminated.

–2.5.17 The grade and thickness of cover material on all surfaces of the fill shall be maintained until stabilized.

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–2.5.18 There shall be stored within the boundaries of the landfill, a standby supply of cover material equal to twenty-five (25) percent of the volume of the landfill consumed in ten days at normal disposal rates.

–2.5.19 Only vehicles displaying the New Jersey Bureau of Solid Waste Management registration number and a current registration indicator shall be admitted for unloading of any solid waste at or near the active working face of a sanitary landfill when commercial type collection or haulage vehicles (including but not limited to compactor trucks, trailers, or any vehicle that tilts or uses other mechanical means to discharge its solid waste) are unloading or when heavy equipment is operating at the working face.

–2.5.20 Operators of sanitary landfills may elect to provide one or more containers of sufficient capacity within a designated secure area under the landfill's control (located a safe distance from the active working face and the movement of associated landfill equipment and commercial type collection and haulage vehicles) so that waste may

be unloaded from non-commercial automobiles and station-wagons and deposited therein under supervision of landfill personnel. Provision for bulky items may also be provided. The landfill operator shall be responsible for the sanitary condition and orderly appearance of the designated area. It shall be the operator's responsibility to remove the waste from the containers and to deposit it in the active working face and/or remove the bulky items from the area and deposit them in the designated landfill area at such frequency so as not to exceed the capacity of the area or containers. Scavenging is prohibited.

–2.5.21 New facilities shall install the gas venting and monitoring systems indicated on the approved engineering design prior to operating. A phase-in of the system is permitted if so indicated on the approved engineering design. Existing facilities shall be required to design, obtain departmental approval of the design, and implement a gas venting and monitoring system when so ordered by the Department as a result of the detection of landfill gases beyond the perimeter of the designated fill area. Detection may be by ground probing or vegetation damage. The recovery of landfill gases for use as a fuel is not prohibited by this subsection. In no case shall the accumulation of combustible gases in excess of their lower explosive limits within confined structures on or adjacent to the facility be permitted.

–2.5.22 No new solid waste facility shall begin operations without first installing a ground water monitoring system constructed and located in accordance with instructions furnished by the Department. Further, no new facility shall begin operations prior to obtaining ground water samples, and analyses thereof, for the purpose of establishing baseline information.

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Upon written notice from the Department that in the opinion of the Department, continued operation of an existing solid waste facility poses a real or potential threat to the quality of the ground waters of the State, the operator of the solid waste facility shall install a ground water monitoring system located and constructed in accordance with instructions furnished by the Department.

The taking and analyses of samples shall be done by a laboratory acceptable to the State using methods approved by the Department, copies of analyses shall be forwarded to the Bureau within thirty (30) days of sampling date.

The initial and annual (submitted with each updated registration statement) analyses shall include the following determinations.

a. presence of organisms of the Coliform Group
b. turbidity
c. color
d. taste
e. odor
f. Arsenic (As)
g. Barium (Ba)
h. Cadmium (Cd)
i. Chromium (hexavalent Cr^{+6})
j. Cyanide (CN)
k. Fluoride (F)
l. Lead (Pb)
m. Selenium (Se)
n. Silver (Ag)

o. A.B.S./L.A.S. (Alkyl-Benzene-Sulfonate and Linear-Alkyl-Sulfonate or similar methylene blue reactive substances contained in synthetic detergents.
p. Chloride (Cl)
q. Copper (Cu)
r. Hardness (as $CaCO_3$)
s. Iron $(Fe)^{++}$
u. Manganese $(Mn)^{++}$
v. Nitrate (NO_3)
w. Phenolic Compounds (as phenol)
x. Sodium (Na)
y. Sulfate (SO_4)
z. Total Dissolved Solids
aa. Zinc (Zn)
bb. C.O.D.
cc. B.O.D.

Each third month the analyses shall include the following determinations:

a. Chloride (Cl)
b. Hardness (as $CaCO_3$)
c. Iron $(Fe)^{++}$
d. Phenolic Compounds (as phenol)
e. Total Dissolved Solids
f. C.O.D.
g. B.O.D.

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–2.5.23 No new solid waste facility shall be initiated nor shall an existing solid waste facility continue within the restricted zone of an airport listed in 7:26-2.5.24 when such

a facility presents a real or potential attraction for birds, until an effective deterent plan shall be implemented. For the purpose of this rule, the restricted zone shall be defined as a two and one half (2½) mile radius centered on the geographic center of the runways.

–2.5.24 The airports referred to in 7:26-2.5.23 are as follows:

Airport	Near
Atlantic City (Pomona)	Atlantic City, NJ
Bader	Atlantic City, NJ
Cape May County	Cape May, NJ
Greater Wilmington	Wilmington, DEL
Linden	Linden, NJ
NAS Lakehurst	Lakehurst, NJ
McGuire AFB	Wrightstown, NJ
Mercer County	Trenton, NJ
Millville	Millville, NJ
Morristown	Morristown, NJ
Newark	Newark, NJ
North Philadelphia	Philadelphia, PA
Philadelphia International	Philadelphia, PA
Teterboro	Teterboro, NJ

Others as designated by the Department.

–2.5.25 After July 1, 1975, the solid waste content of all collection and haulage vehicles shall be determined by weight through the use of appropriate scales at the disposal facility. This subsection shall not apply to:

a. liquid or semi-liquid waste measured in gallons.
b. waste delivered by non-commercial automobiles or station-wagons.

c. waste delivered to solid waste facilities which receive less than twenty (20) trucks and less than five hundred (500) cubic yards, and less than one hundred (100) tons in any one day.

d. waste the weight of which is determined by use of public scales.

e. vegetative waste delivered to solid waste facilities authorized to receive only such waste.

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–2.5.26 The operator of a sanitary landfill shall maintain a record of the quantity accepted for disposal of each category of waste listed on the registration statement. The compilation of the records for the previous twelve months shall be furnished on the annual update registration statement. In the event that scales were not used to physically weigh the waste, volume to weight conversions shall be made by means of formulae furnished by the Department.

–2.6 *Sanitary Landfill Operational Requirements (Specified)*

–2.6.1 Sewage Sludge, Septic Tank and Catch-basin Clean-outs and Other Fecal Material.

–2.6.1.1 No sewage sludge, septic tank or catch-basin clean-out or other fecal material of human or animal origin, liquid or solid, shall be lagooned. All such material shall be immediately and thoroughly mixed with garbage and refuse to attain complete absorption (no free moisture) or shall be discharged into a covered subterranean system sealed from the atmosphere in such a manner as to contain odors and prevent migration of vectors, or shall be converted into an inert non-leaching solid substance, or discharged into a sewage treatment plant.

–2.6.1.2 Cover material shall be applied no later than at the conclusion of the day's operation (immediately if practicable) to all areas whereon sewage sludge, septic tank or catch-basin clean-out or other fecal material of human or animal origin, liquid or solid, has been deposited. Cover over such areas shall in no case be less than twelve (12) inches in depth.

–2.6.1.3 Any solid waste facility accepting sewage sludge, septic tank or catch-basin clean-out or other fecal material of human or animal origin, liquid or solid, for disposal on or in the ground, shall install monitoring wells which are constructed and located in accordance with Department instructions. Samples shall be taken from each well and analyzed by a laboratory acceptable to the Department at least once every three months. Analyses shall be made for the presence of organisms of the Coliform Group and for other determinations as required by the Department. Results of analyses shall be furnished to the Department within thirty (30) days of sampling. Should monitoring well analyses indicate objectionable coliform levels, or if oozing, the presence of seepage, or other ground conditions indicate saturation of the soil, the facility shall discontinue immediately the acceptance of sewage sludge, septic tank and catch-basin clean-outs and other fecal material until such time that in the opinion of the Department, acceptance may resume.

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–2.6.2 Bulky Wastes

–2.6.2.1 Bulky items which are to be placed in the cell of a landfill shall be reduced to the smallest size practicable.

–2.6.2.2 Bulky items shall not be permitted to protrude through the final surface or side slopes of a landfill.

–2.6.2.3 If so indicated on the engineering design, separate areas of a landfill operation may be designated solely for the storage of salvageable bulky wastes (excluding those mixed with putrescible wastes) while awaiting recovery or disposal. Material so handled may be stored without cover for seven (7) days (at no time shall the storage area exceed 50 feet in any direction). Salvage material shall not be stored on the active fill area.

–2.6.3 Radioactive Materials and Lethal Chemicals

–2.6.3.1 Radioactive materials regulated by the Atomic Energy Act of 1954 and lethal chemicals shall not be deposited in or upon the land or waters of the State of New Jersey nor incinerated within the territory governed by the State of New Jersey without prior approval in writing by all authorities having jurisdiction in such matters and by the New Jersey Department of Environmental Protection.

–2.6.4 Pesticides (or Contaminated Containers), Hazardous Wastes, Chemical Wastes, Bulk Liquids and Semi-Liquids.

–2.6.4.1 *Responsibility of the Generator or Owner of the Waste.* It shall be the responsibility of the generator or owner of pesticides (or Contaminated containers), hazardous wastes, chemical wastes, bulk liquids, and semi-liquids to identify and label such materials in accordance with Part 172 et seq., Title 49, Code of Federal Regulations (D. O. T.). It shall be the responsibility of the generator or owner to assure that the selected carrier transporting such materials is one registered with the Bureau of Solid Waste Management, and that the shipment is consigned to a solid waste facility registered with and authorized by the Bureau for the disposal of that specific waste. A shipping document shall be furnished to the carrier by the generator or owner of the waste which

lists all material contained in the shipment, their quantities, the designated disposal facility and any instructions necessary for their safe handling. The generator or owner of such waste, the registered operator of the solid waste facility, the authority having jurisdiction in such matters and the New Jersey State Department of Environmental Protection shall jointly

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determine the method of disposal. It shall be the responsibility of the generator or owner of *hazardous wastes* to furnish to the New Jersey Bureau of Solid Waste Management, annually by the 15th day of February, a list of all such waste materials transferred from his control during the preceding calendar year. The list shall identify the material, the quantity, the type of container in which dispatched, its marking, the carrier including the N. J. B. S. W. M. code number, the date shipped, the shipping document reference number, and the destination.

–2.6.4.2 *Responsibility of the Registered Operator of the Solid Waste Facility.* It shall be the responsibility of the registered operator of each solid waste facility to maintain records and furnish to the New Jersey Bureau of Solid Waste Management a list of all hazardous wastes received for disposal, treatment, or storage during the past calendar year. The list shall be forwarded by the 15th day of February annually. The list shall identify the material, the source, quantity, type of container in which disposed or stored, if any, and how marked, carrier delivering the material (including the N. J. B. S. W. M. code number), shipping document reference number, date received, type of treatment if any, and the location where disposed or stored (this last item should be exact enough to permit recovery of the material if so desired.

–2.6.4.3 Any solid waste facility accepting pesticides (or contaminated containers), hazardous wastes, chemical wastes, bulk liquids or semi-liquids for disposal or storage on or in the ground, shall install monitoring wells which are constructed and located in accordance with instructions available from the Department. Samples shall be taken from each well and analyzed by a laboratory acceptable to the Department at least once every three months. Analyses shall be made for all determinations listed in –2.5.22 and any other determinations specified by the Department. Results of the analyses shall be furnished to the Department within thirty (30) days of sampling. Should monitoring well analyses or any other means of detection indicate a real or potential threat to the quality of the waters of this State by the solid waste facility, the acceptance of pesticides, hazardous wastes, chemical wastes, bulk liquids or semi-liquids shall be discontinued immediately. An acceptable system of interception, collection, and treatment shall be implemented at once and such treatment shall continue until the threat to the water of the State by the solid waste facility shall no longer exist. Prior

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to reacceptance of the discontinued material, an engineering design acceptable to the Department which describes corrective measures to prevent recurrence of the threat must be submitted and the design implemented.

–2.6.4.4 Beginning March 15, 1975, no solid waste facility shall accept or receive for disposal on or in the lands of this State any pesticide (or contaminated containers), hazardous waste, chemical waste, bulk liquid or semi-liquid unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the Department for the entire system. Requests for Department approval may be in the form of an addendum to the engineering design submitted under 7:26-2.2.3 and in accordance with 7:26-2.4, shall be prepared by a New Jersey licensed professional engineer, and shall include detailed engineering drawings and specifications of the proposed system. In addition, requests for Department approval shall specify the exact nature and quantity of each waste to be accepted at the facility, the method of handling and treating those wastes, and shall include proof that all necessary permits and licenses have been obtained for any discharge into the waters of the State.

–2.6.5 *Infectious Waste*

The generator or owner of infectious waste shall be responsible for rendering such waste non-infectious prior to removal from the premises where generated and for certifying to the registered operator of the solid waste facility where assigned and the Bureau that such waste has been rendered non-infectious.

–2.7 *Disrupted Landfill Requirements*

–2.7.1 Written approval shall be obtained from the Department prior to any excavation, disruption, or removal of any deposited material from either an active or discontinued landfill.

–2.7.2 All requests for approval shall include an operational plan stating the area involved, depth of such excavation with final grades, estimated cubic yards of material to be excavated, site where excavated material is to redeposited and estimated time required for completion of excavation procedures.

–2.7.3 All excavation shall be confined to an area consistent with the number of pieces of digging equipment and/or trucks used for haulage.

–2.7.4 Adequate measures shall be taken during excavation to control dust, odors, fires, rodents, insects, and blowing litter.

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–2.7.5 The deposition of all redeposited solid waste resulting from excavation shall be in conformity with all requirements of this subchapter.

–2.8 *Smoking, Smoldering or Burning Landfill*

–2.8.1 In the case of a fire on an active disposal facility the responsibility shall lie with the registered operator. In the case of a fire on a discontinued or unregistered disposal operation, the responsibility shall lie with the person having the title to the premises whereupon the fire exists.

–2.8.2 The operator of any active landfill where smoldering, smoking, or burning is occurring shall immediately notify the police and fire departments having jurisdiction, and the Bureaus of Solid Waste Management and Air Pollution Control.

–2.8.3 The operator of any active landfill shall be responsible for initiating and continuing fire fighting actions until all smoldering, smoking, and burning cease.

–2.8.4 The operator of any landfill shall seek and obtain fire-fighting assistance if smoldering, smoking, or burning persists for longer than twenty-four (24) hours.

–2.8.5 The operator of any landfill shall not conduct disposal activities within the immediate vicinity of any

smoldering, smoking, or burning condition. Precautions shall be taken to prevent disposal activities from interfering with fire-fighting activities.

–2.8.6 Any disruption of the finished grade or covered compacted surfaces shall be repaired and recovered upon completion of fire-fighting activities.

–2.8.7 Control and prohibition of air pollution from refuse disposal and salvage operations shall be effected through compliance with the New Jersey Administrative Code (N. J. A. C.) 7:27-2.1 et seq., Control and Prohibition of Open Burning.

–2.9 *Termination or Change of Ownership of a Landfill*

–2.9.1 The registered operator of any landfill shall notify in writing the State Department of Environmental Protection, and utilities shall petition the Public Utilities Commission pursuant to its rules and regulations of his intent to discontinue operations thereon, at least 30 days prior to the intended date of discontinuance.

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–2.9.2 The State Department of Environmental Protection shall examine all sanitary landfills upon discontinuance of operations to determine whether there is compliance with the New Jersey Administrative Code (N. J. A. C.) 7:26-2, the Rules of the Bureau of Solid Waste Management Concerning Disposal.

–2.9.3 Upon termination of the landfill, a detailed description of the landfill shall be recorded, along with the deed, with the appropriate County Hall of Records. The description shall include the general types and locations of wastes on the site, the depth of fill, the depth and type of cover material, the dates the landfill was in use, and all

such other information as may be of interest to potential landowners.

–2.9.4 Any landfill that is terminated under the provisions of this subchapter must be maintained in accordance with the landfill design submitted and must remain in compliance with all regulations of this subchapter. Responsibility for the maintenance of discontinued operations shall rest with the property owner of record.

–2.10 *Reserved*

–2.11 *General Operational Requirements for Incinerators, Transfer Stations, Processing Facility, and Resource Recovery Facilities*

–2.11.1 Within each twenty-four hour period, the operator of the facility shall clean each area where putrescible waste has been deposited or stored.

–2.11.2 No putrescible waste shall be stored longer than 24 hours at the facility without acceptable treatment to prevent putrefaction.

–2.11.3 Control over the scattering of papers and other lightweight materials shall be effected by the use of fencing and/or other effective methods.

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–2.11.4 Dust control shall be effectively implemented as required.

–2.11.5 The operation of the solid waste facility shall not result in odors associated with solid waste being detected off site by sense of smell in any area of human use or occupancy.

–2.11.6 When requested, the operator shall furnish proof that provisions have been made for the repair or replacement of equipment which becomes inoperative. Reasonable effort shall be taken to insure that faulty equipment shall not interfere with the proper operation of the facility and services provided.

–2.11.7 An adequate water supply and/or fire fighting equipment shall be readily available on site or on call to extinguish any and all fires. Fire fighting procedures shall be posted.

–2.11.8 Control of insects, other arthropods, and rodents shall be effected by means of a program directed by a qualified applicator of pesticides in accordance with the New Jersey Pesticide Control N. J. A. C. 7:20-1 et seq.

–2.11.9 Only vehicles displaying the New Jersey Bureau of Solid Waste Management registration number and a current registration indicator shall be admitted for unloading of any solid waste at or near the active tipping area of the solid wastes facility when commercial type collection or haulage vehicles (including not limited to compactor trucks, trailers, or any vehicle that tilts or uses other mechanical means to discharge it solid waste) are unloading or when other heavy equipment is operating at the tipping area.

–2.11.10 Operators of solid waste facilities may elect to provide one or more containers of sufficient capacity within a designated secure area under the facility's control (located a safe distance from the tipping area and the movement of associated equipment and commercial type collection and haulage vehicles) so that waste may be unloaded from non-commercial automobiles and stationwagons and deposited therein under supervision of facility personnel. Provision for bulky items may also be provided. The facility operator shall be responsible for the sanitary condition and orderly appearance of the designated area.

It shall be the operator's responsibility to remove the waste from the containers and to deposit it in the tipping area and/or remove the bulky items from the area and transfer them to the appropriate unloading area at such frequency so as not to exceed the capacity of the area or containers. Scavenging is prohibited.

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–2.11.11 After July 1, 1975, the solid waste content of all collection and haulage vehicles shall be determined by weight through the use of appropriate scales at the disposal facility. This subsection shall not apply to:

a. liquid or semi-liquid waste measured in gallons.
b. waste delivered by non-commercial automobiles or station-wagons.
c. waste delivered to solid waste facilities which receive less than twenty (20) trucks and less than five hundred (500) cubic yards, and less than one hundred (100) tons in any one day.
d. wastes the weight of which is determined by use of public scales.
e. vegetative waste delivered to solid waste facilities authorized to receive only such waste.

–2.11.12 The operator of a solid waste facility shall maintain a record of the quantity accepted for disposal of each category of waste listed on the registration statement. The compilation of the records for the previous twelve months shall be furnished on the annual update registration statement. In the event that scales were not used to physically weigh the waste, volume to weight conversion shall be made by means of formulae furnished by the Department.

–2.11.13 Radioactive materials regulated by the Atomic Energy Act of 1954 and lethal chemicals shall not be received or stored at any solid waste facility within the territory governed by the State of New Jersey without prior approval in writing by the authorities having jurisdiction in such matters and by the New Jersey Department of Environmental Protection.

–2.11.14 Pesticides, Hazardous Wastes, Chemical Wastes, Bulk Liquids and Semi-Liquids.

–2.11.14.1 *Responsibility of the Generator or Owner of the Waste.* It shall be the responsibility of the generator or owner of pesticides (or contaminated containers), hazardous wastes, chemical wastes, bulk liquids, and semi-liquids to identify and label such material in accordance with Part 172 et seq., Title 49, Code of Federal Regulations (D.O.T.). It shall be the responsibility of the generator or owner to assure that the selected carrier transporting such materials is one registered with the Bureau of Solid Waste Management, and that the shipment is consigned to a solid waste facility registered with and authorized by the Bureau for the disposal of that specific waste. A shipping document shall be furnished to the carrier by the generator or owner of the waste which lists all material contained in the shipment, their quantities, the designated disposal facility and any instructions necessary for their safe handling. The generator or owner of such waste, the registered operator of the

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solid waste facility, the authority having jurisdiction in such matters and the New Jersey State Department of Environmental Protection shall jointly determine the method of disposal. It shall be the responsibility of the

generator or owner of such wastes to furnish to the New Jersey Bureau of Solid Waste Management, annually by the 15th day of February, a list of all *hazardous waste* materials transferred from his control during the preceding calendar year. The list shall identify the material, the quantity, the type of container in which dispatched, its marking, the carrier including the N. J. B. S. W. M. code number, the date shipped, the shipping document reference number, and the destination.

–2.11.14.2 *Responsibility of the Registered Operator of the Solid Waste Facility.* It shall be the responsibility of the registered operator of each solid waste facility to maintain records and furnish to the New Jersey Bureau of Solid Waste Management a list of all *hazardous wastes* received for disposal, treatment, or storage during the past calendar year. The list shall be forwarded by the 15th day of February annually. The list shall identify the material, the source, quantity, type of container in which disposed or stored if any and how marked, carrier delivering the material (including the N. J. B. S. W. M. code number), the shipping document reference number, date received, type of treatment if any, and the location where disposed or stored (this last item should be exact enough to permit recovery of the material if so desired), or the destination if forwarded to another facility.

–2.11.15 *Infectious Waste*

The generator or owner of infectious waste shall be responsible for rendering such waste non-infectious prior to removal from the premises where generated and for certifying to the registered operator of the solid waste facility where assigned and the Bureau that such waste has been rendered non-infectious.

–2.12 *Guidelines and Criteria for Preparation of Engineering Designs*

–2.12.1 *General*

–2.12.1.1 A minimum of six (6) complete sets of drawings for each design shall constitute a submission.

–2.12.1.2 Individual drawing sheets shall not exceed 30″ x 42″ in size.

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–2.12.1.3 Each drawing sheet shall bear the raised seal of the New Jersey licensed professional engineer responsible for preparation of the design. It is recommended that a geologist be employed to prepare the subsurface data and interpretation.

–2.12.1.4 A key map shall be provided showing the general location of the proposed disposal facility. Key map is to be plotted on 1:24,000 U.S.G.S. topographical quadrangle.

–2.12.1.5 A plot plan which depicts the legal boundaries determined by survey for which clear title is held by the applicant shall be provided. If the property is leased by the applicant, a copy of the lease agreement shall accompany the plot plan.

–2.12.1.6 Lot and Block numbers of the property shall be provided.

–2.12.1.7 Approximate total acreage of the property shall be determined and shown.

–2.12.1.8 Location of the geographic center of runways of airports within two and one-half (2½) miles of the property line of the solid waste facility shall be shown.

–2.12.2 *Sanitary Landfills*

–2.12.2.1 The specific limits or portion of the proposed active landfill operation shall be clearly defined with permanent markers or equivalent. Review and approval of any submission will be restricted to only that portion of the total acreage for which all design criteria is provided.

–2.12.2.2 Existing topographical contours of the property and proposed final elevations shall be shown at a maximum of five (5) foot intervals. Horizontal scale shall be at least one (1) inch to two hundred (200) feet. Two (2) foot contour intervals and a scale of one (1) inch to one hundred (100) feet is preferred. Elevations shall be based on the New Jersey Geodetic Control Survey datum. Use of any other datum must be supported by an explanatory statement and an equation to the N. J. G. C. S. datum.

–2.12.2.3 The area wide sequence of development stages of the landfill operation shall be shown. A narrative description of the planned method of operation (including heavy equipment) shall be submitted to supplement the design drawing.

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–2.12.2.4 Soil borings of the property shall be provided in accordance with the following table:

Acreage	*Minimum Number of Borings*
1 –10	3
10 –50	6
50 –100	12
100–200	18
over 200	minimum 24

–2.12.2.5 All borings shall be to a minimum depth of ten (10) feet below the seasonally adjusted maximum ground water elevation or twenty (20) feet below the lowest elevation of the proposed fill.

–2.12.2.6 Profiles shall be shown for each boring giving the depths of each soil classification and the elevation of any ground water or aquifer encountered, and shall include the date each boring was taken.

–2.12.2.7 A geological and ground water map shall be provided showing ground water levels and the direction(s) of flowing for all surface and ground waters within a one-half (½) mile radius of the proposed landfill operation.

–2.12.2.8 All registered wells within a one-half (½) mile radius of the proposed landfill operation shall be plotted.

–2.12.2.9 All public buildings within a one-half (½) mile radius of the proposed landfill shall be plotted and identified.

–2.12.2.10 All surface and subsurface drains which are used to control the passage of water from areas on, or adjacent to, the landfill property shall be shown.

–2.12.2.11 If a design includes an impermeable liner under the fill area, the method of collection and treatment of leachate generated within the fill shall be detailed.

–2.12.2.12 All fill areas or excavations shall be shown to terminate no closer than fifty (50) feet from all property boundary lines.

–2.12.2.13 Detailed profile views for any excavation on the property and the manner of filling the excavation shall be shown.

–2.12.2.14 Detailed profile views showing grades and elevations for any and all dikes, berms or other pollution protective devices or techniques as may be required and

constructed, shall be provided. No grade or slope shall exceed a ratio of 2:1.

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–2.12.2.15 All proposed landscaping, beautification, and screening techniques shall be shown.

–2.12.2.16 The system to provide for venting and monitoring of gases generated within the fill shall be shown in detail.

–2.12.2.17 Monitoring wells to determine ground water quality shall be plotted and construction described.

–2.12.2.18 The estimated capacity of the site in tons shall be calculated, inplace density given, and projections made to determine the life expectancy of the site based on current and/or anticipated loadings.

–2.12.2.19 A completed Supplemental Engineering Data form shall be submitted with the design. (Forms are available from the Bureau of Solid Waste Management).

–2.12.2.20 An environmental impact statement, if required, shall be submitted to the Department.

–2.12.2.21 Copies of all departmental permits as may be required or written proof of application therefor, due to stream encroachment or flood plain involvement and copies of all titles for lands involved in riparian lands or wetlands (together with land use permits) shall be submitted.

–2.12.2.22 If known, use of the site after closure shall be detailed including the time frame for implementation.

–2.12.3 *Incinerators*

–2.12.3.1 The rated capacity (in both tons per day and tons per hour) of the facility shall be shown.

–2.12.3.2 The current daily loadings and any anticipated or projected future loadings shall be shown.

–2.12.3.3 Unloading and storage facilities shall be shown and explained in detail including capacities in cubic yards and time such facilities can be practically used based on current loadings.

–2.12.3.4 Any emergency unloading, storage facilities or disposal facility to be used when down time of the incinerator will exceed twenty-four (24) hours, shall be shown and explained.

–2.12.3.5 Alternate unloading locations or plans for transfer in the event down time of the facility exceeds forty-eight (48) hours shall be shown and explained.

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–2.12.3.6 Rodent and odor control techniques to be employed shall be explained.

–2.12.3.7 Daily quantity of residue tonnage from the facility shall be shown.

–2.12.3.8 Disposal location for all residue (including but not limited to by-products resulting from air pollution control devices, quench water, etc.) shall be made known.

–2.12.3.9 Any recycling or reclamation activities operated in conjunction with the facility either on the incoming solid waste or the outgoing residue, shall be described in detail.

–2.12.4 *Transfer Stations and Resource Recovery Facilities*

–2.12.4.1 A completed registration application form shall be submitted.

–2.12.4.2 A descriptive statement of the process used and operation at this facility shall be prepared and submitted.

–2.12.4.3 Site location map, including lot and block numbers, access roads and other geographic features shall be shown.

–2.12.4.4 Drawings of buildings and other structures–showing type of construction, layout and dimensions for unloading, storage, compaction, processing, and loading areas, type of floor, and closures shall be included.

–2.12.4.5 The means to control litter, odors, rodents, and insects shall be described.

–2.12.4.6 The description of equipment shall include type, capacity, and number of units.

–2.12.4.7 Daily capacity of the complete facility in tons shall be shown.

–2.12.4.8 Design capacity as to number and type of vehicles bringing solid waste to the facility daily shall be delineated.

–2.12.4.9 Design capacity as to number and type of transfer vehicles hauling waste or reclaimed material from the facility shall be shown.

–2.12.4.10 A description of provisions to handle unusual peak loadings, exceeding planned capacity shall be provided.

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–2.12.4.11 Emergency provisions for equipment breakdown or power failure shall be described.

–2.12.4.12 The maximum length of time solid waste will be stored in the facility shall be indicated.

–2.12.4.13 Measures taken to protect and monitor the quantity of ground water and nearby surface streams shall be shown if the station is to handle liquid and/or liquid-solid mixture wastes.

–2.12.4.14 Measures taken to monitor and control combustible gases where these will be generated shall be described in detail.

–2.12.4.15 Seal of the professional engineer responsible for the design is to be affixed on the plan.

–2.12.5 *Other Methods of Disposal*

–2.12.5.1 All appropriate Guidelines and Criteria from 7:26-2.12.1 to 2.12.4 shall be followed for the preparation of the engineering design and any such data and information as may be necessary so that the Bureau can make an evaluation shall be provided.

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7:26-3 Rules of the Bureau of Solid Waste Management Concerning Collection and Haulage

–3.1 *Improper Collection or Haulage Prohibited*

–3.1.1 The collection and haulage of organic and/or combustible matter or other forms of solid waste on the roadways and highways in this State shall be made only through the use of:

a. Collection and/or haulage systems established, operated and maintained in accordance with the regulations set forth in this subchapter.

b. Other methods of collection and haulage as may be approved by the State Department of Environmental Protection.

—3.2 *Registration*

—3.2.1 Registration statement; filing with the Department. No person shall engage or continue to engage in the collection and/or haulage of solid waste in this State without first filing a completed Registration Statement with the Bureau. The Registration Statement shall be signed by the person engaged in or desiring to engage in the collection and/or haulage of solid waste, shall be executed on forms prescribed by and furnished by the Bureau, and shall state such information necessary and proper to enforcement of this subchapter as the Department may require.

—3.2.2 Approved Registration. No person shall engage in the collection and/or haulage of solid waste in this State without having an Approved Registration from the Department.

—3.2.3 No person shall engage in the collection and/or haulage of solid waste in this State if such an operation does not meet the collector-hauler requirements listed in 7:26-3. In addition, the operation must comply with any other conditions or limitations which may be specified on the approved registration.

—3.2.4 Time for filing. Prior to May 1 in each calendar year, each registrant shall submit to the Department a statement updating the information contained in the registration statement. Such information shall be submitted on forms supplied by the Department. In no case shall the submission of an updating registration statement alter the conditions under which the approved registration is granted.

—3.2.5 Alteration of Registration Statement. The registrant shall notify the Department in writing within 30 days

of any change of information supplied on his current Registration Statement.

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—3.3 *Domestic Refuse*

—3.3.1 The provisions of this subchapter shall not be applicable to haulage in family passenger automobiles or station-wagons of family garbage or refuse off the premises where the family resides nor shall the provision of these rules be interpreted as permitting the haulage of domestic sewage in any manner other than that prescribed by law. vehicles not registered with the Bureau of Solid Waste Management are not permitted to discharge solid wastes at or near areas where commercial type collection or haulage vehicles are unloading or where heavy equipment is operating.

—3.4 *Collector-Hauler Requirements (General)*

—3.4.1 Length of service routes shall be kept consistent with the proper operation of trucks and/or equipment in order that the area or route services can be completed during a normal operating day.

—3.4.2 All collected solid waste shall be properly deposited at an approved facility in accordance with the New Jersey Administrative Code (N. J. A. C.) 7:26-1 and 7:26-2.

—3.4.3 Unless an emergency, such as inclement weather, equipment breakdown, or accident warrants, no solid waste shall be allowed to remain or be stored in any collection or haulage vehicles in excess of twenty-four (24) hours.

—3.4.4 No vehicle shall be used for collection and/or haulage if the design of the vehicle is such that any solid waste material will spill onto the roadways and highways of this State.

—3.4.5 No vehicle used for collection and/or haulage shall be used beyond its design capabilities or in such a manner that littering and spillage of solid wastes onto the roadways and highways of this State will occur.

—3.4.6 All vehicles used for the collection and/or haulage of solid waste shall be maintained in good working condition to protect the health and safety of the workmen and citizens of this State and to provide prompt and efficient service. The registered operator of any collection and/or haulage system shall provide a means of continuous service in the event an emergency arises.

—3.4.7 All workmen or collection crews operating solid waste collection systems shall take reasonable care to protect the property of customers being served. Any damage or spillage of solid waste as a result of the collector's actions shall be his responsibility.

—3.4.8 All vehicles used for the collection and haulage of solid waste shall properly and conspicuously display all numbers and decals assigned by the Bureau of Solid Waste Management.

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—3.4.9 Tarpaulins or covers shall be provided and used as needed while transporting solid wastes.

—3.5 *Collector-Hauler Requirements (Specific)*

—3.5.1 Sewage Sludge and Other Fecal Material

—3.5.1.1 All vehicles used for the collection and/or haulage of such wastes shall be of such a design so as to preclude any spillage or leakage onto the roadways and highways of the State.

—3.5.1.2 Sewage sludge and other fecal material shall not be inter-mixed with other wastes of a chemical or industrial nature for haulage to a disposal operation.

—3.5.2 Bulky Wastes

—3.5.2.1 All vehicles used for collection and/or haulage of such wastes shall be such a design so as to preclude any spillage onto the roadways and highways of the State.

—3.5.3 Radioactive Materials and Lethal Chemicals

—3.5.3.1 Radioactive materials regulated by the Atomic Energy Act of 1954 and lethal chemicals shall not be transported in or through the State of New Jersey without prior approval in writing by all authorities having jurisdiction in such matters and by the New Jersey Department of Environmental Protection.

—3.5.4 Hazardous and/or Chemical Wastes, Excluding All Radioactive Wastes.

—3.5.4.1 All collectors and haulers of such wastes shall obtain from the generator of such wastes a bill of lading listing the material(s) to be hauled. Such waste shall not be mixed with other categories of wastes in shipment.

—3.5.4.2 All collectors and haulers of such wastes are responsible for operating within existing laws governing the transportation of such materials including Chapter 128, PL 1950.

—3.5.4.3 All vehicles used for the collection and haulage of such wastes shall be of a design to preclude any spillage or leakage onto the roadways and highways of the State.

—3.5.4.4 Collectors and haulers of such wastes shall not transport drummed hazardous wastes whereby said drums or containers are damaged, rusted, leaking, or without proper tight fitting covers or lids.

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–3.5.4.5 All drums and containers of hazardous or chemical wastes in transport to a disposal facility shall be properly labeled in accordance with existing statute and regulations of the State of New Jersey.

–3.6 *Reserved*

–3.7 *Smoking, Smoldering, or Burning Solid Waste in Collection or Haulage Vehicles*

–3.7.1 No collector or hauler shall provide service where waste materials to be picked up and hauled show evidence of smoking, smoldering, or burning.

–3.7.2 All waste in transit that must be dumped in an emergency due to smoking, smoldering, or burning shall be the responsibility of the collector-hauler. The operator of the vehicle shall immediately notify the police and fire departments having jurisdiction. The collector or hauler shall be responsible for clean-up of all materials dumped in an emergency.

–3.8 *Reserved*

–3.9 *Reserved*

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7:26.4 RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT CONCERNING FEES

–4.1 *General*

–4.1.1 In accordance with Chapter 461, P. L. 1971, there is hereby established a Fee Schedule. Said schedule shall apply to all sanitary landfill operations, incinerators, transfer stations, processing facilities, resource recovery facilities or any other methods of disposal requiring registration

with the Department, and shall include but not be limited to all vehicles used in collection and/or haulage of solid wastes.

–4.2 *Payment of Fees*

Fees shall be paid by certified check or money order and made payable to: Treasurer, State of New Jersey.

–4.3 *Fee Schedule*

–4.3.1 *Solid Waste Facilities*

Submission of an Engineering Design for review (per design)	$500.00
Submission of Registration Statement or Annually with Updated Registration Statement	500.00
Transfer of Registration	50.00

–4.3.2 *Solid Waste Collection and Haulage*

Submission of Registration Statement or Annually with Updated Registration Statement

First vehicle	45.00
Each additional vehicle on the same registration	5.00

The registration of a Solid Waste Collection and/or Haulage System is non-transferable.

–4.4 *Resubmission of Designs*

The fee for review of an engineering design for a solid waste facility will entitle the registrant to submit or resubmit all information found deficient on the first submission until such time as the approval of the engineering design is granted or denied.

–4.5 *Reserved*

NEW JERSEY STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF SOLID WASTE MANAGEMENT
P.O. BOX 2007
TRENTON, N.J. 08625

REGISTRATION STATEMENT FOR A SOLID WASTE FACILITY

A SEPARATE REGISTRATION IS REQUIRED FOR EACH SOLID WASTE FACILITY

INCOMPLETE OR IMPROPERLY PREPARED STATEMENTS WILL BE RETURNED.
— PRINT OR TYPE ONLY —

1. If the above name and address of registrant is incorrect or missing enter corrected information where indicated. (Use SSN ONLY if you do not have a FEID number)

2 F Federal Employer ID No. OR 2 S 6 8 Soc. Sec. No.

12 APPLICANT'S - LAST NAME 31 FIRST NAME 43 I 44 TITLE

45 COMPANY OR TRADE NAME

12 STREET ADDRESS

28 CITY 51 STATE 54 ZIP CODE 59 AREA 62 TELEPHONE NUMBER 65

2. 69 NEW STATEMENT 69 UPDATED STATEMENT 70 REGISTRATION NO.

3. TYPE ORGANIZATION (CHECK ONLY ONE)

12 SOLE PROPRIETOR 12 PARTNERSHIP 12 INCORPORATED 12 MUNICIPALITY
12 COUNTY 12 UNIT OF STATE GOV. 12 AUTHORITY
12 OTHER (EXPLAIN) _____

4. SOLID WASTE FACILITY DATA

14 STREET ADDRESS OF FACILITY 29 MUNICIPALITY (CITY)

32 COUNTY BLOCK NO. 62 LOT NO. 67 THROUGH LOT NO. 71

If property description has additional block and lot information, attach a separate sheet including all block and lot data. Check this box to indicate additional data. 75

A. LICENSED BY PUC 13 NO 13 YES (If yes give PUC Certificate No.) 18

B. ESTIMATED REMAINING LIFE OF THIS FACILITY. 19 YEARS AND 21 0 0 0 TONS
(BASED ON PRESENT USE RATE)

C. THIS PROPERTY OWNED 39 OR LEASED 39 BY APPLICANT

PAGE 1

APPENDIX A

D

6. PROPERTY TITLE DATA

A. CERTIFIED COPY OF TAX MAP SHOWING BLOCK & LOT NOS.
ATTACHED 20 PREVIOUSLY SUBMITTED 20 DATE SUBMITTED 21 MO | DAY | YR.

B. 37 OWNERS - LAST NAME 33 FIRST NAME 47 I
12 STREET ADDRESS
28 CITY 57 STATE 54 ZIP CODE

E

C. IF LEASED -
1. LEASE ENCLOSED 39 2. PREVIOUSLY SUBMITTED 39 DATE 40 MO | DAY | YR.

7. ENGINEERING DESIGN PREPARED BY LICENSED PROFESSIONAL ENGINEER (6 COPIES)
ATTACHED 66 UPDATED DESIGN 66 PREV. SUBMITTED 66 DATE 67 MO | DAY | YR.

F

8. A. PARTNERS OR OFFICERS OF CORPORATION, GOVERNMENTAL BODY OR PUBLIC AUTHORITIES.
12 LAST NAME 31 FIRST NAME 43 I 44 TITLE

G

12 31 43 44

H

12 31 43 44

I

12 31 43 44

J

B. CORPORATION DATA
REGISTERED IN - 12 STATE 12 COUNTY DATE REG. 28 MO | DAY | YR.
31 AGENT - LAST NAME 49 FIRST NAME 61 I

K

12 AGENT STREET ADDRESS
28 AGENT - CITY 51 STATE 54 ZIP CODE 59 AREA 62 AGENT TELEPHONE NO. NUMBER 65

L

9. NATURE OF OPERATION (CHECK ALL APPLICABLE ITEMS)

13 SANITARY LANDFILL 14 INCINERATOR
16 COMPOSTING FACILITY 16 CHEMICAL PROCESSING & TREATMENT
17 RESOURCE RECOVERY 16 TRANSFER STATION
16 OTHER (EXPLAIN) _____

APPENDIX A

PAC

ENTER FEID OR SSN HERE [ ][ ][ ][ ][ ][ ][ ][ ][ ]

10. MATERIAL FOR DISPOSAL:

REQUESTED:		FOR OFFICE USE ONLY APPROVED
(a) SOLIDS:		
20[ ]	MUNICIPAL (HOUSEHOLD, COMMERCIAL, INSTITUTIONAL)	21[ ]
22[ ]	DRY SEWAGE SLUDGE	23[ ]
24[ ]	BULKY WASTES	25[ ]
26[ ]	CONSTRUCTION AND DEMOLITION	27[ ]
28[ ]	PESTICIDES - DRY	29[ ]
30[ ]	PESTICIDE CONTAINERS	31[ ]
32[ ]	HAZARDOUS WASTES - DRY	33[ ]
34[ ]	CHEMICAL WASTES - DRY	35[ ]
36[ ]	JUNKED AUTOS	37[ ]
38[ ]	TIRES	39[ ]
40[ ]	DEAD ANIMALS	41[ ]
42[ ]	LEAVES AND CHOPPED TREE WASTES	43[ ]
44[ ]	AGRICULTURE AND FOOD PROCESSING WASTES	45[ ]
46[ ]	TREE STUMPS	47[ ]
48[ ]	OIL SPILL CLEAN-UP WASTES	49[ ]
(b) LIQUIDS:		
50[ ]	WASTE OIL	51[ ]
52[ ]	BULK LIQUIDS AND SEMI-LIQUIDS	53[ ]
54[ ]	SEWAGE: SEPTIC OR OTHER FECAL LIQUIDS	55[ ]
56[ ]	PESTICIDE LIQUIDS	57[ ]
58[ ]	HAZARDOUS WASTE LIQUIDS	59[ ]
60[ ]	CHEMICAL WASTE LIQUIDS	61[ ]

11. OPERATIONAL DATA

A. INDICATE ACTUAL INCLUSIVE DATES USED IN REPORTING THIS DATA.

PERIOD FROM 13 MO. | DAY | YR. [ ][ ] | [ ][ ] | [ ][ ] (12 MONTHS) PERIOD TO 19 MO. | DAY | YR. [ ][ ] | [ ][ ] | [ ][ ]

B. Enter total Tonnage or Gallons of Solid and Liquid wastes received at your facility for the Past 12 MONTHS for each category listed:

(1) SOLID WASTES — TOTAL TONNAGE

a. MUNICIPAL (HOUSEHOLD, COMMERCIAL, INDUSTRIAL)	25		a
b. DRY SEWAGE SLUDGE	33		b
c. BULKY WASTES	41		c
d. CONSTRUCTION & DEMOLITION	49		d
e. PESTICIDES - 1. DRY	57		e
f. 2. CONTAINERS	65		f
g. HAZARDOUS WASTE - DRY	13		g
h. CHEMICAL WASTE - DRY	21		h
i. JUNKED AUTOS	29		i
j. TIRES	37		j
k. DEAD ANIMALS	45		k
l. LEAVES AND CHOPPED TREE WASTES	53		l
m. AGRICULTURE AND FOOD PROCESSING WASTE	61		m
n. TREE STUMPS	69		n
o. OIL SPILL CLEAN-UP WASTE	13		o
(12 MONTHS) TOTAL SOLID WASTES RECEIVED	21		

APPENDIX A

11. OPERATIONAL DATA (CONTINUED FROM PAGE - 3)

(2) LIQUID WASTES — TOTAL GALLONS

a. WASTE OIL	31	
b. BULK LIQUID WASTES	42	
c. SEWAGE: SEPTIC OR OTHER FECAL	53	
d. PESTICIDE LIQUIDS	64	
e. HAZARDOUS LIQUIDS	13	
f. CHEMICAL LIQUIDS	24	
(12 MONTHS) TOTAL LIQUIDS RECEIVED	35	

C. Enter total Tonnage or Gallons of Solid or Liquid Wastes recovered at your facility during the past 12 months for each category listed:

(1) RECYCLED SOLID WASTES — TOTAL TONNAGE

a. FERROUS METALS	13	
b. NON-FERROUS METALS	21	
c. NEWSPRINT	29	
d. CORRUGATED	37	
e. OTHER PAPER PRODUCTS	45	
f. GLASS	53	
g. CHEMICALS - DRY	61	
h. PLASTICS	69	
i. TIRES	13	
j. JUNKED AUTOS	21	
TOTAL RECYCLED SOLIDS		

(2) RECYCLED LIQUIDS — TOTAL GALLONS

a. OIL	29	
b. CHEMICAL SOLVENTS	40	
c. OTHER CHEMICAL LIQUIDS	51	
TOTAL RECYCLED LIQUIDS		

12. FEE SCHEDULE
(Refer to N.J.A.C. 7:26-4 FOR FEE SCHEDULE)

All fees must be submitted with this statement by CERTIFIED CHECK or MONEY ORDER - Payable to "TREASURER, STATE OF NEW JERSEY."

Check or Money Order No. 13 [ ][ ][ ][ ][ ][ ][ ][ ][ ] AMOUNT 23 [ ] DOLLARS [ ][ ][ ] CENTS [ ][ ]

I CERTIFY THAT THE INFORMATION SUBMITTED ON THIS FORM AND ANY ATTACHMENTS APPENDED ARE TO THE BEST OF MY KNOWLEDGE. MY ID NUMBER AND SIGNATURE ARE ON ALL ATTACHMENTS.

SIGNATURE _____ TITLE _____ 29 MO. | DAY | [ ][ ] | [ ][ ] DATE

FOR OFFICIAL USE ONLY

CERT. DATE: MO. | DAY | YR. [ ][ ] | [ ][ ] | [ ][ ]

ENG. DES. APPR.: _____ SIGNATURE APPENDIX A

Appendix B to Appendix N. Page 1.

Special Instructions for Completing Items 4, 11 and 12 of Registration Statement for a Solid Waste Facility

A. For Public Utility Commission Certificate Number (Item 4A) in excess of four digits use only the last four digits and place an asterisk (*) to the right of the blocks.

B. Fees (Item 12) annually with submission of updated registration statement = $500.00

submission of engineering designs = 500.00

transfer of registration = 50.00

C. To calculate tonnage of solid waste *received* (Item 11B) (conversion from cubic yards)

1. Municipal Waste (Household, Commercial, Institutional)

in non-compacting vehicles—multiply cubic yards by 0.12
in compactor trucks of 20 c. y. capacity or less—multiply cubic yards by 0.25
in compactor trucks of between 21 and 25 c. y. capacity—multiply cubic yards by 0.35
in compactor trucks of more than 25 c. y. capacity—multiply cubic yards by 0.40

2. Construction, Demolition, Bulky Items, Whole Tires, Leaves and Chopped Tree Wastes, Tree Stumps, Agriculture and Food Processing Wastes, Dead Animals and Shredded Tires—Multiply cubic yards by 0.20

3. Pesticides (dry), Hazardous Wastes (dry), Chemical Wastes (dry)—Multiply cubic yards by 2.0

4. Oil Spill Clean-up Wastes—Multiply cubic yards by 0.45

5. Dry Sewage Sludge and Pesticide Containers—Multiply cubic yards by 0.15

6. Junked Autos 2.0 tons per car regardless of cubic yards.

D. To calculate remaining life of facility (Item 4B) in years and tons (NOTE: applicable only to sanitary landfills).

1. Convert tonnage received to total in-place volumes (cubic yards) by multiplying the annual tonnage received for each category by the following factors and then finding the sum:

Category	*Factor*
Municipal (household, commercial, industrial)	(2.0)
Dry sewage sludge	(1.8)
Bulky Wastes	(10.0)
Construction and demolition	(6.7)
Pesticides (dry)	(0.5)
(containers)	(1.8)
Hazardous wastes (dry)	(0.5)
Chemical wastes (dry)	(0.5)
Junked autos	(*)
Tires—rubber (shredded)	(1.2)
(whole)	(10.0)

Appendix B to Appendix N. Page 2.

Category (continued)	*Factor*
Dead animals	(1.2)
Leaves and chopped tree wastes	(10.0)
Agriculture and food processing waste ..	(1.2)
Tree Stumps	(5.0)
Oil spill clean-up waste	(2.5)

° Each car three (3) cubic yards

2. Life remaining in years:

$$\text{Years} = \frac{1613\ A\ (H\text{-}C)}{y} \times 0.85$$ where:

Years = remaining life of facility in years
1613 = conversion factor
A = number of acres remaining to be filled °
H = overall height of remaining lifts in feet
C = total thickness of cover material in feet
y = sum of in-place volume (in cubic yards) received annually
0.85 = correction factor (allowing for required boundaries and side slopes)

° If a partial lift remains to be filled, calculate this fraction separately—then combine.

3. Life remaining in tons:

Tons = Years x Sum of the annual tons received

NEW JERSEY STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF SOLID WASTE MANAGEMENT
P.O. BOX 2807 TRENTON, N.J. 08625

REGISTRATION STATEMENT FOR A SOLID/LIQUID WASTE COLLECTOR OR HAULER

PRINT OR TYPE ONLY
INCOMPLETE OR IMPROPERLY PREPARED APPLICATIONS WILL BE RETURNED.
—COMPLETE BOTH SIDES OF FORM—

1. If the above name and address of registrant is incorrect or missing enter only the corrected information where indicated. Use SSN ONLY if you do not, have a FEID.

1 FEDERAL EMPLOYER ID NO. F FEID —OR— SOCIAL SECURITY NUMBER SSN S
APPLICANTS NAME - LAST | FIRST | I | TITLE
COMPANY OR TRADE NAME

2 STREET ADDRESS
CITY | STATE | ZIP CODE | AREA | TELEPHONE NUMBER

2. NEW STATEMENT UPDATED STATEMENT REGISTRATION NO.

3. TYPE ORGANIZATION (Check only one) (COL 13)
1 PROPRIETOR 2 PARTNERSHIP 3 INCORPORATED 4 MUNICIPALITY
5 COUNTY 6 UNIT STATE GOV. 7 AUTHORITY 8 HOMEOWNER
9 OTHERS HAULING OWN WASTE

4. TYPE OF WASTE (Check all applicable areas) (COLS. 14-21)
(14) 1 MUNICIPAL (HOME, COMM, INSTITU.) (18) 5 SEPTIC TANK WASTE
(16) 2 DRY CHEMICAL (INCL. HAZARDOUS) (17) 6 SEWAGE PLANT SLUDGE
(18) 3 CONSTRUCTION & DEMOLITION (19) 7 LIQUID CHEMICAL (INCL. HAZARDOUS)
(20) 4 TREE & YARD WASTE (21) 8 INDUSTRIAL & OTHER

3 5. PUC LICENSED? NO YES PUC CERTIFICATE NUMBER

6. FEES MUST BE SUBMITTED BY CERTIFIED CHECK OR MONEY ORDER-PAYABLE TO "TREASURER, STATE OF NEW JERSEY" REFER TO N.J.A.C. 7:26-4 FOR FEE SCHEDULE.

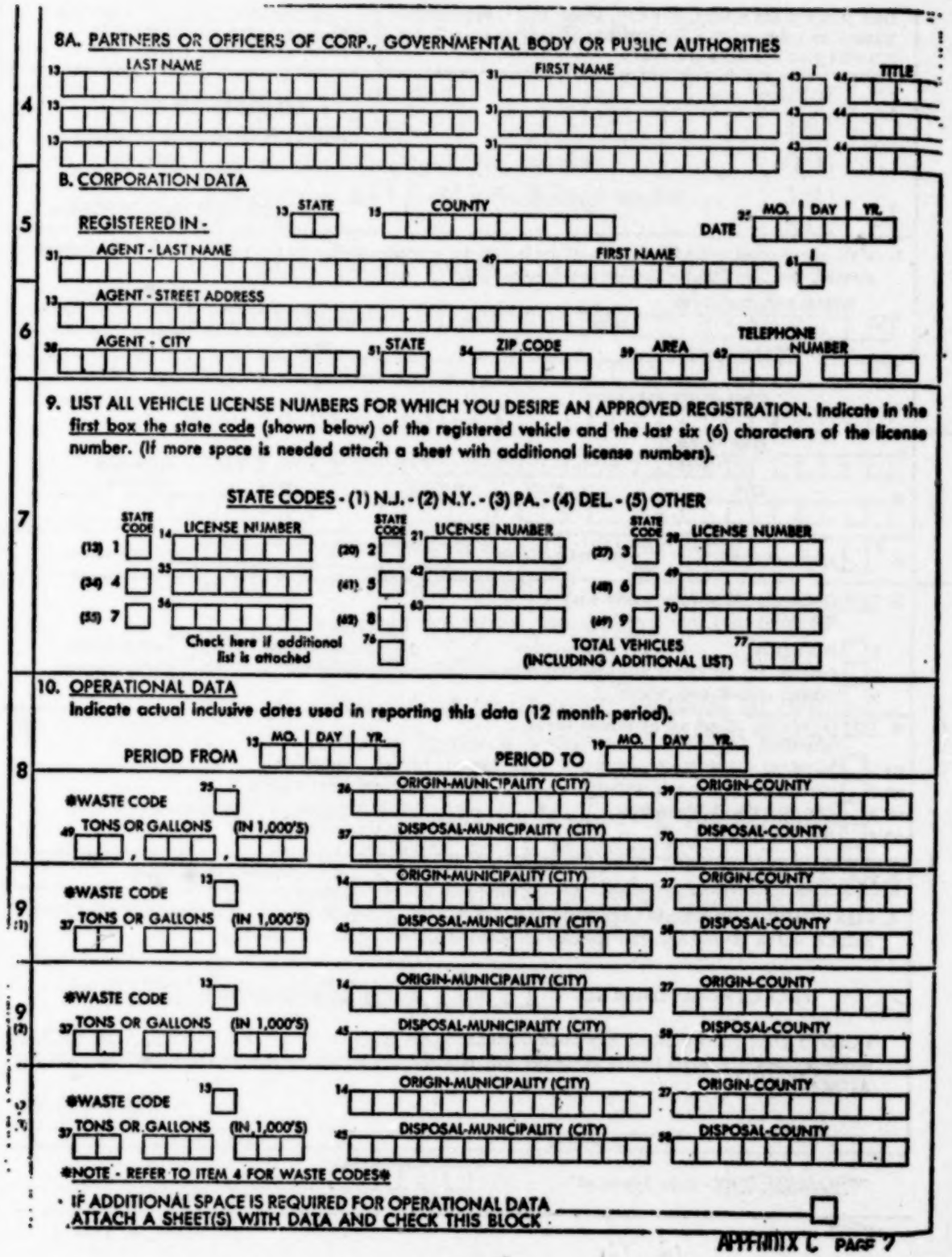
CHECK OR MONEY ORDER NO. AMOUNT .00

I CERTIFY THAT THE INFORMATION SUBMITTED ON BOTH SIDES OF THIS FORM AND ANY ATTACHMENTS APPENDED ARE TRUE TO THE BEST OF MY KNOWLEDGE. MY ID NUMBER AND SIGNATURE ARE ON ALL ATTACHMENTS.

SIGNATURE | TITLE | DATE (MO. DAY YR.)

OFFICIAL USE ONLY - Date Approved (MO. DAY YR.) SIGNATURE

APPENDIX C PAGE 1



8A. PARTNERS OR OFFICERS OF CORP., GOVERNMENTAL BODY OR PUBLIC AUTHORITIES

4 — LAST NAME | FIRST NAME | I | TITLE

B. CORPORATION DATA

5 — REGISTERED IN - STATE | COUNTY | DATE MO. DAY YR.

AGENT - LAST NAME | FIRST NAME | I

6 — AGENT - STREET ADDRESS

AGENT - CITY | STATE | ZIP CODE | AREA | TELEPHONE NUMBER

9. LIST ALL VEHICLE LICENSE NUMBERS FOR WHICH YOU DESIRE AN APPROVED REGISTRATION. Indicate in the first box the state code (shown below) of the registered vehicle and the last six (6) characters of the license number. (If more space is needed attach a sheet with additional license numbers).

7 — STATE CODES - (1) N.J. - (2) N.Y. - (3) PA. - (4) DEL. - (5) OTHER

STATE CODE | LICENSE NUMBER (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9)

Check here if additional list is attached

TOTAL VEHICLES (INCLUDING ADDITIONAL LIST)

10. OPERATIONAL DATA

Indicate actual inclusive dates used in reporting this data (12 month period).

8 — PERIOD FROM MO. DAY YR. | PERIOD TO MO. DAY YR.

9 (1) — *WASTE CODE | ORIGIN-MUNICIPALITY (CITY) | ORIGIN-COUNTY | TONS OR GALLONS (IN 1,000'S) | DISPOSAL-MUNICIPALITY (CITY) | DISPOSAL-COUNTY

9 (2) — *WASTE CODE | ORIGIN-MUNICIPALITY (CITY) | ORIGIN-COUNTY | TONS OR GALLONS (IN 1,000'S) | DISPOSAL-MUNICIPALITY (CITY) | DISPOSAL-COUNTY

9 (3) — *WASTE CODE | ORIGIN-MUNICIPALITY (CITY) | ORIGIN-COUNTY | TONS OR GALLONS (IN 1,000'S) | DISPOSAL-MUNICIPALITY (CITY) | DISPOSAL-COUNTY

NOTE - REFER TO ITEM 4 FOR WASTE CODES

IF ADDITIONAL SPACE IS REQUIRED FOR OPERATIONAL DATA ATTACH A SHEET(S) WITH DATA AND CHECK THIS BLOCK

APPENDIX C PAGE 2

Appendix D to Appendix N.

Special Instructions for Completing Items 5, 6 and 10 of Registration Statement for a Solid/Liquid Waste Collector or Hauler

A. PRIVATE AUTOMOBILES AND STATION WAGONS NEED *NOT* REGISTER.

B. In order to properly complete Item 10 of the *Registration Statement for a Solid/Liquid Waste Collector or Hauler*, it may be necessary to convert cubic yards of waste to tons where the actual weight of the wastes collected have not been determined through the use of scales. To convert from cubic yards to tons, simply multiply the volume (in yards) by the appropriate factor listed below.

1. *For Municipal-Type Wastes (Household, Commercial, Institutional):*

   in Non-Compacting Vehicles: Multiply cubic yards by 0.12

   in Compactor Trucks up to 20 c.y. capacity: Multiply cubic yards by 0.25

   in Compactor Trucks with capacity between 21 and 25 c.y.: Multiply cubic yards by 0.35

   in Compactor Trucks with capacity over 25 c.y.: Multiply cubic yards by 0.40

2. *For Construction, Demolition, Yard Wastes, and Other Bulky Wastes:*

   Multiply cubic yards by 0.20

3. *For Dry Chemicals (liquids should be entered as gallons):*

   Multiply cubic yards by 2.0

C. For *out-of-state wastes only* (Item 10), enter the name of the state (New York-Penna.-Delaware-Other) in blocks marked County.

D. For Public Utility Commission Certificate Number Item 5) in excess of four digits, use only the last four digits and place an asterisk (*) to the right of the blocks.

E. Fees (Item 6) Annually:

1st vehicle (each registrant) = $45.00

each additional vehicle (same registrant) = 5.00

F. Item 10—Report actual tons of solid materials and thousands of gallons for liquid materials.

EXAMPLE:

22 cubic yard compactor, 5 loads per day municipal waste, 6 days per week, 52 weeks per year (for this example use factor of 0.35)

22	x	5	x	6	x	52	x	0.35	=	12012
cubic yards per load		loads per day		days per week		weeks per year		factor for vehicle and type of waste		Tons per year

Return application No LATER THAN JUNE 15, 1974

APPENDIX O.

Pereira Deposition, Dated March 13, 1974.

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particular site Joe Miller has all the ground water data and he is in the ground water section.

When it comes to a ground water, the formation, the location and so on and so forth, they turn to me.

Then, of course, Dr. Kemball Widmer, who is our Chief, as in all offices where the brass is concerned, he would have the ultimate say.

Mr. Meisel: That is all I have.

• • •

LINO F. PEREIRA, sworn.

DIRECT EXAMINATION.

By Mr. Meisel:

Q. Mr. Pereira, I am going to ask you a series of questions.

The purpose of the questions is to in no way trick you but simply to elicit answers to the questions that are asked.

If you do not understand a question at any time or if the question needs to be rephrased for you to understand it, please ask me and I will do so.

A. Right.

Q. Could you please state your place of employment.

A. I work for the New Jersey Department of Environmental Protection, the Bureau of Solid Waste Management

[65]

in the Division of Environmental Quality.

Q. What is your position in that Bureau?

A. I am principal environmental engineer with that Bureau.

Q. How long have you served in that capacity?

A. For approximately 10 months.

Q. Were you employed by the State of New Jersey prior to that time?

A. Yes. I have been employed by the State and specifically the Bureau of Solid Waste Management since early June of 1970.

Q. In what capacity were you employed prior to being employed as principal engineer?

A. For the first year of my employment I was employed with the title of Chemical Engineer Trainee.

For the subsequent year I was employed as an Assistant Environmental Engineer.

For approximately 11 months thereafter I was employed as a senior environmental engineer and since that time I have held the title of Principal Environmental Engineer.

Q. Were you employed for any other concern prior to coming with the State?

A. Not on a full-time basis, that is, not other than summer work and part-time work while I was in college.

Q. When did you graduate from college?

[66]

A. In 1970.

Q. With what degree?

A. Bachelor of Science in Chemical Engineering.

Q. Do you hold any license issued by the State of New Jersey?

A. Not any license, not as a licensed professional engineer although I am registered with the Board of Professional Engineers under Title 45 as an engineer in train-

ing, which is a prerequisite for obtaining a license as a professional engineer.

Q. I notice that you have obtained a BS in Chemical Engineering.

Did you have any specific course work concerning sanitary engineering?

A. None specifically concerning sanitary engineering although a number of the courses one is required to take for chemical engineering are also required by sanitary engineering.

Q. Are you familiar with Public Law 1973 Chapter 363 passed by the State of New Jersey, being an act to prohibit any person from bringing into this state any solid and liquid waste which originated or was collected outside the state and supplementing the Waste Control Act approved February 21, 1973?

A. Yes, I am.

• • •

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department are based largely upon the state of the art at this time and not upon the threat or not necessarily upon the threat to the health, safety and welfare.

Q. I would request that the last question that I asked be answered with a Yes or No because your response did not answer that question.

Mr. Meisel: Read it back, please.

(The reporter read the pending question.)

Mr. First: If you can answer that Yes or No, go ahead.

A. It is a rather difficult question to answer.

Q. The standards either are or are not adequate. It seems to me that it can be answered Yes or No.

A. My answer would be as they are now promulgated they are not adequate, in my opinion.

Q. Are the standards as proposed in the proposed rules of the Bureau of Solid Waste Management adequate to protect the public health, safety and welfare or the quality of the environment?

A. Only insofar as those standards are met by the operation.

Q. All right. So if they are met is your answer Yes?

A. My answer is Yes but it is qualified to the extent that sometimes it is not feasible or possible to men-

• • •

[99]

know about.

Q. How does the Department of Environmental Protection compute the life expectancy of a particular landfill site?

A. The only method or the method that the department has used and does use in computing the life expectancy of a sanitary landfill site utilizes the information submitted with the engineering design, that information being the life expectancy of the site as calculated by the design engineer and the tonnage received at the site per week.

The calculation by the department assumes that the tonnage will remain constant and that the engineer calculated his life expectancy on that constant tonnage and the calculation involves taking the tons per week—well, I can probably stop here and say that for any particular site the life expectancy is given to us in the engineering design by the licensed professional engineer who provided it and it is assumed that he does so based on current tonnages or expected tonnages at the site.

Q. Let us suppose that it is a 200-acre site, that the site is uniform throughout and as a result there are no special problems, the entire site is useful, that 10,000 tons per week is brought to that site, that the site will be built up by 50 feet, that one is using the usual six inches of daily cover and 2 feet of final cover, what would

[100]

the anticipated life expectancy of that site be, utilizing the best compaction methods available in the state of the art?

A. We are speaking about a 200-acre site by 50 feet in depth, uniformly 50 feet across the entire thing?

Q. That is correct.

A. And you were asking for the maximum amount of solid waste that can be placed therein?

Q. I am asking for the anticipated life expectancy of the site.

A. Could you give me the rate at which tonnage is brought in again?

Q. 10,000 tons per week.

A. Are we pre-supposing here that the operator utilizes the space to the maximum by under existing standards creating each lift as high as is permitted under existing standards?

Q. Yes, we are.

A. Are you asking me to calculate it or do you want to know how we would calclulate it?

Q. I am asking you to calculate it.

A. My calculations bring this to over 12 years or 12.4 years in fact, assuming that one-fifth of the volume is consumed by soil cover.

Q. What is the expected or anticipated life

[101]

expectancy of landfills presently existing in the State of New Jersey?

A. That is very difficult to calculate because of a number of factors.

Our best estimate is that the existing landfills in the state have no more than 10 years of life.

Q. Would the life expectancy of existing landfills be increased by using a variety of processing alternatives to reduce weight and/or volume of solid waste?

A. Yes, I believe so.

Q. Has there been any estimate as to how long that life expectancy would be extended by using such processing alternatives?

A. No, there hasn't been any estimate to my knowledge.

Q. Has there been any estimate as to the availability of additional acreage in the State of New Jersey for sanitary landfill purposes?

A. No estimate has been made but noting the establishment of new sanitary landfills, the rate of that establishment is low compared to the frequency with which landfills cease to exist in this state.

Q. Can new sanitary landfills be established in the State of New Jersey?

A. Yes, I believe they can be established.

[102]

Q. You indicated earlier that certain kinds of land may be more suitable than other kinds of land for sanitary landfill purposes.

A. That's correct.

Q. Is there any estimate as to the number of acres of the most suitable land for sanitary landfill purposes which presently exists in the State of New Jersey?

A. I find that a very difficult question to answer because, first, it speaks to the relative suitability of one piece

of land over another piece of land for the use of sanitary landfill.

If one defines one's standards stringently enough, I suppose it is possible to end up with very little square feet of land that is entirely suitable.

Q. Under existing standards in the State of New Jersey which could not be used for sanitary landfill purposes?

A. Yes.

Q. What kind of land could not be used?

A. Lands which are, for instance, protected in their natural state as are flood plains, wetlands, various tidal lands existent in the state as well as, of course, other restrictions such as local land use requirements so far as they apply to sanitary landfill sites.

[103]

Q. I am not speaking to whatever local land use requirements there might be.

A. You are speaking only of environmental considerations?

Q. Approximately how many acres would you calculate there are involved in the kinds of land you suggested would be absolutely unsuitable or unusable for sanitary landfill purposes?

A. I don't know.

Q. Does it represent a substantial portion of the land of the State of New Jersey in terms of the total land area of the state or does it represent an insubstantial total land area taken the total land area of the state?

A. Again I don't know because I don't deal specifically with those lands.

I can only answer that in my experience with the review of designs and the approval of existing facilities

in the state that a substantial portion of the existing facilities, sanitary landfills in the state does now or did consist of those lands.

Q. Who is responsible for working in those areas?

A. The Wetlands Act is administered specifically by the Wetlands Section in the Division of Marine Services in the Department of Environmental Protection.

The flood plain requirements are administered speci-

• • •

[112]

Q. Is it the volume of solid waste which causes a threat?

A. Yes, in terms of its tonnage, the actual quantity of waste, the degree of threat is directly proportionate to the tonnage of waste disposed.

Q. If there was less tonnage would the threat or could the threat be diminished to a point where it would not pose a substantial or material threat?

A. I suppose it could but I could not possibly put my finger on the tonnage that would not pose a substantial or material threat.

It may only be one ton. I don't know.

Q. Can New Jersey dispose of all or a portion of its solid waste outside the State of New Jersey?

A. Can it do so?

Q. Yes.

Mr. First: You mean can the people of the state?

Mr. Meisel: Yes.

A. As far as I know under existing legislation it can be done. It is possible.

Q. Are there instances in which communities in New Jersey dispose of all or a portion of the solid or liquid waste originating in those municipalities outside of the State of New Jersey?

[113]

A. There have been instances in the past and even in the recent past, if one considers 1971 the recent past. I am not familiar with the communities or the quantities after 1971.

Q. Does the City of Phillipsburg dispose of substantially all its solid waste outside the State of New Jersey?

A. It did in the calendar year 1971 as far as I know.

Q. Are there sanitary landfill facilities outside of the State of New Jersey which accept solid waste which originates inside of the State of New Jersey?

A. I don't know if there are sanitary landfill facilities.

Our records merely indicate that in the Calendar year 1971 some wastes were exported from the state to disposal sites outside the state.

Q. Has the Department of Environmental Protection explored the question as to whether a greater percentage than now exists of solid waste originating in New Jersey can be disposed of outside the State of New Jersey?

A. You mean by that have we contemplated sending more out?

Q. No. I am asking if you have looked into alternatives, whether there are facilities to which you could

[114]

send solid waste originating in New Jersey which exist outside the State of New Jersey.

A. I can think of no effort on our part to look into that at all.

Our planning for Solid Waste Management has assumed that New Jersey will bear the responsibility for its own wastes.

The planning has gone on accordingly.

Mr. Meisel: I think we can break for the day.

• • •

APPENDIX P.

Filed March 21, 1974

JAMIESON, WALSH, McCARDELL, MOORE
AND PESKIN,
a Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

Docket No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al
Defendants

NOTICE OF MOTION

TO: WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

SIR:

Please take notice that the undersigned, attorneys for plaintiffs, will apply to the Superior Court of New Jersey,

Mercer County Court House, Trenton, New Jersey on Friday, March 22, 1974 at 9:00 A. M. or as soon thereafter as counsel may be heard, for summary judgment in favor of plaintiffs only upon the issues of federal preemption and discrimination against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution; and plaintiffs will make further application for an order to set the date of hearing on the merits of the matter, if such hearing is necessary, on Monday, April 15, 1974, or upon such other day as may be ordered by the court and not on Monday, March 25, 1974 as presently scheduled.

On or before Monday, March 18, 1974, there will be served upon defendants the documents upon which plaintiffs will rely at the hearing on this motion.

JAMIESON, WALSH, McCARDELL, MOORE
and PESKIN
A Professional Corporation

by: ARTHUR MEISEL
Arthur Meisel

Dated: March 14, 1974

APPENDIX Q.

It is thus evident that the court must consider *"all the relevant facts and circumstances."* At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints*. The Supreme Court has stressed that:

> *". . . state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.* Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 U. S. 8, 87 L. ed. 578, 63 S. Ct. 420); Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594.
>
> • • •
>
> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and *whether the relative weights of the state and national interests involved are such as to make inapplicable the rule. . ."* *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 770, 89 L. Ed. 1915, 1925, 65 S. Ct. 1515 (1944) (emphasis added).

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the affect on interstate commerce.

• • •

APPENDIX R.

WILLIAM F. HYLAND
Attorney General Of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
DOCKET No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

NOTICE OF APPEAL.

To: CLERK OF THE COURT
HONORABLE GEORGE Y. SCHOCH
Judge, Superior Court of New Jersey
Mercer County Court House
Trenton, New Jersey 08607

HERBERT F. MOORE, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
One West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Interstate 287 and McKinley Street
South Plainfield, New Jersey 07080

SIRS:

NOTICE IS HEREBY GIVEN that all defendants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey, appeal to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring P. L. 1973, c. 363 unconstitutional as violative of Article I, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

BY: MARK L. FIRST
Mark L. First
Deputy Attorney General

DATED: April 19, 1974

I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

APPENDIX S.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2202-73

Civil Action

CITY OF PHILADELPHIA, etc., et als.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

MOTION FOR STAY PENDING APPEAL.

To: CLERK OF THE COURTS

ARTHUR MEISEL, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
Attorney for Plaintiffs-Appellants
1 West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Attorney for Plaintiffs-Intervenors-
Appellants
Interstate 287 and McKinley Street
South Plainfield, New Jersey

SIRS:

PLEASE TAKE NOTICE that the undersigned, attorney for defendants-appellants, hereby moves the Superior Court of New Jersey, Appellate Division, for an order staying the judgment entered by the Superior Court of New Jersey, Law Division, Mercer County (Schoch A. J. S. C.) on March 27, 1974.

In support of the within motion, the defendants-appella.. will rely on the brief and affidavits submitted herewith and the brief and appendix submitted on July 9, 1974.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Deputy Attorney General

DATED: July 26, 1974

APPENDIX T.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2202-73
Motion No. M-1978-73
Before Part P

Judges: HANDLER, MEANOR, CRANE

CITY OF PHILADELPHIA, etc., et als

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als

v.

STATE OF NEW JERSEY, et al.

Moving Papers Filed:	July 26, 1974
Answering Papers Filed:	August 8 & 9, 1974
Date Submitted to Court:	August 12, 1974
Date Argued:	
Date Decided:	August 14, 1974

ORDER

This matter having been duly presented to the Court, it is hereby ordered as follows:

	GRANTED	DENIED	OTHER
MOTION FOR STAY		X	X

SUPPLEMENTAL:

The appeal shall be accelerated.

FOR THE COURT:

ALAN B. HANDLER
P. J. A. D.

I hereby certify that the
foregoing is a true copy of
the original on file in my
office.

ELIZABETH MCLAUGHLIN
Clerk

WITNESS, THE HONORABLE ALAN B. HANDLER, PRESIDING JUDGE OF PART P, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, this 14th day of August, 1974.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

APPENDIX U.

SUPREME COURT OF NEW JERSEY
#10927 September Term 1974

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause on March 25, 1974 in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-2202-73), be certified directly to this Court for review by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers to be filed by the parties in the prosecution of this appeal shall be filed by the Clerk of this Court without payment of fees for such filing; and it is further

ORDERED that this matter be consolidated with Hackensack Meadowlands Development Commission and State

of New Jersey v. Municipal Sanitary Landfill Authority, et al and City of Yonkers, New York (A-1592-73).

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton on this 7th day of October, 1974.

FLORENCE R. PESKOE
Clerk

APPENDIX V.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY
DOCKET No. A-82-74
September Term 1974
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

ORDER GRANTING STAY AND CONTINUING INJUNCTIVE RELIEF.

This matter being opened to the court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs-respondents, Herbert F. Moore, Esq. appearing in the presence of Assistant Attorney General Stephen L. Skillman, attorney for defendants-appellants for an order temporarily staying the judgment of the Supreme Court of New Jersey in the above cap-

tioned matter and temporarily continuing the injunctive order heretofore entered by the Superior Court of New Jersey, Law Division, in connection therewith, and good cause being shown,

It is on this 20th day of November, 1975,

ORDERED, that the judgment of this court heretofore entered in this action on November 18, 1975 against plaintiffs-respondents be and hereby is temporarily stayed and that the injunctive order heretofore issued in connection with this case is hereby temporarily extended until further order of the court; and it is

FURTHER ORDERED, that plaintiffs-respondents shall file a memorandum with this court, and serve same upon the parties to this proceeding, not later than Wednesday, Nov. 26, 1975, demanding such relief as they deem appropriate including argument in support thereof, and defendants-appellants shall thereafter have a period of 10 days within which to file and serve a responsive memorandum thereto.

RICHARD J. HUGHES,
C. J.

Consent as to form:
William F. Hyland, Attorney General
of New Jersey
Attorney for Defendants-Appellants,
State of New Jersey, et al.

By: STEPHEN L. SKILLMAN,
Stephen L. Skillman,
Asst. Attorney General
Jamieson, McCardell, Moore, Peskin and Spicer

By: HERBERT F. MOORE
Herbert F. Moore

APPENDIX W.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74
September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

NOTICE OF MOTION.

To: Stephen L. Skillman, Esq.
Assistant Attorney General
State House
Trenton, N. J. 08625

NOTICE is hereby given by the undersigned, counsel for the plaintiffs-respondents, of the filing of a Motion with

the Supreme Court of New Jersey in accordance with the copy attached hereto.

Dated: November 26, 1975

JAMIESON, McCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

JAMIESON, McCARDELL, MOORE, PESKIN
and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY
Docket No. A-82-74
September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al,
Defendants-Appellants.

MOTION FOR REMAND, STAY OF JUDGMENT AND CONTINUATION OF RESTRAINTS

TO: Honorable The Chief Justice
and Associate Justices of
Supreme Court of New Jersey:

The plaintiffs-respondents, City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and

DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.) move for an order of the New Jersey Supreme Court, in order of preference, and in the alternative, for the following relief:

A. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) all issues raised in the complaint; and (2) whether, and for what period, injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey;

B. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) taking of private property for public use without just compensation; (3) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

C. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

D. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

E. Stay of judgment and continuation of injunctive relief pending a determination by the United States Supreme Court of an application by plaintiffs for continuing injunctive relief pending appeal.

Plaintiffs-Respondents will rely upon the annexed Brief and Appendix in support of said Motion.

JAMIESON, MCCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-
Respondents

APPENDIX X.

SUPREME COURT OF NEW JERSEY
M-433 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay and continuation of injunctive relief is denied; and it is further

ORDERED that the order temporarily staying the judgment and injunctive order, entered November 20, 1975, is vacated, effective December 31, 1975.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-436 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Movants,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-434 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC.
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further

ORDERED that this Court does not retain jurisdiction.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

APPENDIX Y.

SUPREME COURT OF THE UNITED STATES

No. A-563

CITY OF PHILADELPHIA, ET AL.,
Appellants

v.

NEW JERSEY, ET AL.

ORDER.

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey entered November 18, 1975, in case No. A-82, be and the same is hereby, stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 31
day of December, 1975

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By FRANCIS J. CORSON

APPENDIX Z.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-82-74
SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

– and –

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

AFFIDAVIT.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. I have examined the report entitled *Solid Waste: A Coordinated Approach*, 7th edition, prepared by the State of New Jersey County and Municipal Government Study Commission. This report is usually referred to as the Musto Report. This report takes the position, based upon certain acreage calculations of existing landfill sites that the available landfill acreage in New Jersey will be entirely exhausted by 1981, and that the landfills serving Bergen, Essex, Hudson, Passaic and Union Counties, which produce 48% of the State's annual volume of solid waste, will be exhausted in 1975.

5. The aforesaid calculations are based on inaccuracies and misconceptions of the landfill business. On page 4 of the report, it is stated that the calculations of landfill acreage are based upon an average depth of fill of 15 feet, including earth cover and minimal compaction. In actual practice throughout New Jersey, the average fill in major landfills is at least 40 feet.* This conclusion can be supported by examination of the engineering designs on file in the Department of Environmental Protection. I have personally been involved in engineering design of a significant number of landfills in New Jersey, and have personally made site inspections of a large percentage of the major landfill sites in the state, all of which support this conclusion. The significance of the variance in full results in substantial increase in the actual capacity of available landfill acreage as of 1972.

6. According to Table IV-1 on page 37 of the Musto Report, the available landfill acreage as of 1972 is 9,880 acres. To determine landfill capacity based on the assumption of 15 feet depth of fill, the Musto Report calculates that 783 acres of landfill space will be used up during the year of 1972, when in actuality, less than ½ of the acreage will be thoroughly used up. This is based on 40 feet rather than 15 feet fill. This will effectively extend the landfill life throughout the State of New Jersey from 1981 to approximately 1990.

7. In addition to the engineering designs on file with the Department of Environmental Protection and giving consideration to landfill designs previously filed with the Department but not yet taken into consideration in their calculations, together with landfill designs of which I have personal knowledge that are in the process of being developed, there is available as of November 25, 1975, approximately 180,000,000 in place cubic yards for disposal. The effect of this would be to extend existing landfill life expectancy to approximately 1986. This evaluation does not take into consideration other landfills presently being designed or contemplated by other engineering concerns, which will add to the presently known life expectancies. This conclusion is in harmony with the conclusion the Musto Report should have reached had it properly calculated the average depth of fill at 40 feet rather than 15 feet.

8. The waste generated in Pennsylvania, and being disposed of in New Jersey is estimated at 10,000 tons a week. A 200 acre site brought to 50 feet elevation would satisfactorily handle this disposal for a period of approximately 15 years.

9. Sanitary landfilling of devastated areas resulting from mining operations is an ideal land reclamation project

if operated in accordance with the present Department of Environmental Protection rules and regulations. While there are no statistics available as to the amount of such devastated acres in New Jersey, it is readily apparent to an observer, and particularly to me, who specializes in waste disposal, that there are many sites throughout New Jersey that are ideally suited for this type of land reclamation in accordance with Department of Environmental Protection regulations. The use of such areas for landfill purposes would significantly increase the long-range capacity for waste disposal in New Jersey.

10. The Musto Report, on page 38, table 4, reveals that by the end of 1975, Bergen, Essex, Hudson, Passaic and Union Counties will have zero acres available. This, in fact, is not true since there are landfills in operation continuing in these areas.

11. On behalf of Interstate Waste Removal Co., Inc., I have submitted a preliminary engineering design to the New Jersey Department of Environmental Protection for a certain severely mined tract of land in Bordentown Township, Burlington County, New Jersey, comprising 93 acres and located upon Block 134, Lots 3, 4, and 14 as same appear on the Bordentown Township Tax Atlas.

12. When brought to final grade and cover, properly engineered and designed sanitary landfills are ideally suited for public recreational uses, and may also be used for specific commercial and industrial projects which have been considered at the time engineering plans and designs were filed with the New Jersey Department of Environmental Protection. In filing plans which contemplate commercial and industrial use, certain portions of the proposed landfill facility may be left untouched in order to avoid problems concerning support of heavy structures.

13. Sanitary landfilling may be used as an economical process to recover ravaged land. The recovery of land in this manner may have the dual advantages of recreating recreational space and green acres, while simultaneously providing a facility from which methane gas may readily be recovered and processed into natural gas and fed into the commercial gas system.

*Interpretation of the Notice of Public Hearing dated March 1975 issue of the New Jersey Register, Document #021-75-02 dated February 14, 1975 and signed by David Bardin, Commissioner of Environmental Protection indicates that 52 constituting the major landfill facilities within the State of New Jersey handle 80% of the solid waste disposed of in the State.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and subscribed before me
this 25th day of November, 1975.
FLORENCE W. EDWARDS
Florence W. Edwards

Notary Public of New Jersey
My Commission Expires May 29, 1976

APPENDIX AA.

Delaware—*D. C. A.* 16, § 1701.

§ 1701. Bringing garbage or household refuse into State; permit and bond.

No person shall bring into the State from any place without the State, garbage or household refuse for the purpose of feeding it to hogs or for any other purpose, unless there has first been obtained from the State Board of Health a permit naming the area within which such garbage or household refuse shall be disposed of, and unless there has been deposited with the State Board a bond for the sum of $500 which shall be forfeitable if the disposal of such garbage is not provided for in such a manner as meets the requirements of the State Board. (38 Del. Laws, c. 46, § 1; Code 1935, § 890; 16 Del. C. 1953, § 1701.)

Illinois—S. *H. A.* ch. 111½, § 1021.

§ 1021. Acts prohibited.

No person shall:

(a) Cause or allow the open dumping of garbage;

(b) Cause or allow the open dumping of any other refuse in violation of regulations adopted by the Board;

(c) Abandon, dump, or deposit any refuse upon the public highways or other public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board;

(d) Abandon any vehicle in violation of the "Abandoned Vehicles Amendment to the Illinois Vehicle Code", as enacted by the 76th General Assembly; [1]

1. Chapter 95½, § 18-100 et seq.

(e) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, after the Board has adopted standards for the location, design, operation, and maintenance of such facilities;

(f) Dispose of any refuse, or transport any refuse into this State for disposal, except at a site or facility which meets the requirements of this Act and of regulations thereunder.

P. A. 76-2429, § 21, eff. July 1, 1970.

Louisiana—LSA—R. S. 40:1299-36.

§ 1299.36. Transportation of industrial wastes, burial or other disposal.

A. No person shall transport any industrial waste material into Louisiana with the intent to bury, store or otherwise dispose of such wastes in Louisiana if it is reasonably foreseeable that the health of any member of the public or animal life will be endangered thereby. For the purposes of this section the term "industrial wastes" shall include both solid and liquid wastes from industrial processes. This section shall not be construed so as to prohibit the transportation of waste materials into Louisiana which may be beneficial to citizens of Louisiana.

B. It shall be unlawful for any person to bury or otherwise dispose of industrial waste material, whether solid or liquid, which has been transported into Louisiana, if it is reasonably foreseeable that the health of any member of the public or animal life will be endangered thereby. This section shall not be construed so as to prohibit the transportation of waste materials into Louisiana with the intent to further process such materials into useful products. Provided that this section shall not prohibit the transportation from Louisiana offshore locations into the state of oil waste material disposed of into abandoned wells located within the state's boundaries, nor shall this section prohibit said disposal of oil waste material into abandoned wells located within the state's boundaries.

C. Whoever violates the provisions of this section shall be fined not less than ten thousand dollars nor more than fifteen thousand dollars.

D. Any existing civil remedy may be used for the enforcement of this section by any interested party. The state board of health is hereby declared to be an interested party in the enforcement of this section.

E. Nothing herein shall be construed so as to divest the state board of health of any regulatory power which is not inconsistent herewith.

Added by Acts 1973, No. 78, § 1.

Maine—17 *M. R. S. A.* § 2253.

§ 2253. Out-of-state waste matter.

As used in this section, "waste matter" means garbage, refuse, solid or liquid waste, ashes, rubbish, industrial and commercial waste, and all other refuse of every description, whether loose, in containers, compacted, baled, bundled or otherwise.

No person, firm, corporation or other legal entity shall deposit, or cause or permit to be deposited, any waste matter in any structure or on any land within the State, which waste matter originated outside the State.

Nothing in this section shall be construed to prohibit the transportation of waste matter into the State for use as a raw material for the production of new commodities which are not waste matter as defined.

Whoever shall violate this section shall be punished by a fine of not less than $200 nor more than $2,000 for each violation. Each day that such violation continues or exists shall constitute a separate offense.

The Superior Court, upon complaint of the Attorney General, the municipal officers of any municipality, or any local or state health officer, shall have jurisdiction to restrain or enjoin violations of this section, and to enter decrees requiring the removal from the State of waste matter deposited in violation of this section. In any such civil proceeding neither an allegation nor proof of unavoidable or substantial and irreparable injury shall be required to obtain a temporary restraining order or injunction, nor shall bond be required of the plaintiff; and the burden of proof shall be on the defendant to show that the waste matter involved originated within the State.

The Legislature finding that waste matter of the nature hereinafter described poses no threat to the environment of this State, the provisions of this section shall not be construed to prohibit persons, firms, corporations and other legal entities now or previously depositing waste matter on property within the State owned on January 1, 1970 by them, which waste matter originates from property owned by them adjacent to the border of the State, from continuing to so deposit waste matter of the same nature as has been so deposited; except that this provision shall not apply to solid waste after December 31, 1971.
1970, c. 570, eff. Feb. 5, 1970.

Massachusetts—*M. G. L. A.* c. 270 § 17A.

§ 17A. Importation of outside garbage and other waste for deposit in dumping facilities; penalty; exceptions.

No person, firm or corporation or any city or town engaged in the business of the collection and disposal of

rubbish or garbage or other refuse from residences or business facilities located outside the commonwealth, shall deposit such rubbish, garbage or other refuse in any dumping facility in this commonwealth. Whoever violates this section shall be punished by a fine of one hundred dollars. Each such violation shall constitute a separate offense. The provisions of this section shall not apply to rubbish, garbage or refuse so deposited under a regional waste matter agreement entered into by the governing bodies of the parties to such agreement whether within or without the commonwealth, nor under a recycling program whereby at least sixty per cent of such rubbish, garbage or refuse is scheduled to be recycled; provided, however, that the remainder of such rubbish, garbage or refuse not so recycled shall not be so deposited without the prior approval of the governing body of the city or town wherein such rubbish, garbage or refuse is to be deposited.
Added by St. 1971, c. 474.

1971 Enactment. St. 1971, c. 474 was approved June 30, 1971.

New Hampshire—*R. S. A.* 147:30e.

147:30-e Definitions. As used in this subdivision:

I. "Waste matter" means garbage, refuse, solid or liquid waste, ashes, rubbish, industrial and commercial waste, and all other refuse of every description, whether loose, in containers, compacted, baled, bundled or otherwise.

Source. 1971, 272:2, eff. Aug. 22, 1971.

147:30-f Prohibition. No person, firm, corporation or other legal entity shall deposit, or cause or permit to be deposited, any waste matter in any structure or on any land within the state or in the territorial waters of the

state, which waste matter originated outside the state. Nothing in this section shall be construed to prohibit the transportation of waste matter into the state for use as a raw material for the production of new commodities which are not waste matter as defined. Each person guilty of a violation of this section shall be guilty of a separate offense for each day all or part of the waste matter which is the subject matter of such violation is allowed to remain in the structure, on the land, or in the water in which it was deposited.

Source. 1971, 272:2, eff. Aug. 22, 1971.

147:30-g Exemption. Nothing in RSA 147:30-f shall be construed to prohibit the disposal of out-of-state garbage, manure, putrescible materials or refuse at a public disposal facility provided the out-of-state city or town of origin is a participating member of a New Hampshire regional refuse disposal district as provided in RSA 53-B, or has arranged to share public disposal facilities with a New Hampshire city or town.

Source. 1971, 272:2, eff. Aug. 22, 1971.

147:30-h Penalty. Whoever shall violate this subdivision shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

Source. 1971, 272:2. 1973, 529:20, eff. 11:59 P.M., Oct. 31, 1973.

Pennsylvania—35 *P. S.* § 6007.

§ 6007. Applications and permits.

(a) It shall be unlawful for any person, municipality, county or authority to use or continue to use their land or the land of any other person, municipality, county or authority as a solid waste processing or disposal area of a solid waste management system or transport solid wastes

to a mine without first obtaining a permit from the department: Provided, however, That no permit will be required by municipalities, counties or authorities transporting their municipal wastes to a landfill operating under permit when such landfill is a part of their solid waste management plan which has been approved by the department: And, Provided further, That this section shall not apply to farmers and they shall not be required to obtain a permit for normal farming operations: and provided further, that this section shall not apply to the storage of by-products which are utilized in the processing or manufacturing of other products.

(b) Application for a permit shall be in writing and shall be made on a form prescribed, prepared and furnished by the department and shall set forth such information and be accompanied by such data as the department may require.

(c) Upon approval of the application, the department shall issue a permit for the operation of each solid waste processing or disposal facility or area set forth in the application.

(d) Plans, designs and relevant data for the construction or alteration of solid waste processing and disposal facilities and the location of solid waste processing and disposal areas shall be prepared by a registered professional engineer and shall be submitted to the department for approval prior to the construction, alteration or operation of such facility or area except when food process wastes are used for agricultural purposes in a manner which will not create a public health hazard or pollution of the air or water.

(e) Any permit granted by the department, as provided in this act, shall be revocable or subject to suspen-

sion at any time the department shall determine that the solid waste processing or disposal facility or area (i) is, or has been conducted in violation of this act or the rules, regulations, or standards adopted pursuant to the act, or (ii) is creating a public nuisance, or (iii) is creating a health hazard, or (iv) adversely affects the environment or economic development of the area.

(f) In any case where a permit is required by this section for the disposal of solid wastes produced by a public utility or a municipally owned facility producing electricity or other types of power intended for use by the public, the department shall not refuse an application, or revoke or suspend a permit previously granted, unless it first obtains from Pennsylvania Public Utility Commission a certification that such refusal, revocation, or suspension will not adversely affect utility service to the public.

(f.1) The department shall refuse any application from and shall not grant any permit to any person, municipality, county or authority which includes as part of its solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

(g) In case any permit is denied, suspended or revoked, a hearing shall be held thereon before the department within fifteen days after request therefor is made by the person, municipality, county or authority whose permit is denied, suspended or revoked. Within seven days following the date of such hearing the department shall notify all parties in writing of the determination of said hearing and the reasons therefor. Any party aggrieved by this determination shall have the right of appeal in accordance with the provisions of the act of June 4, 1945 (P. L. 1388), known as the "Administrative Agency Law." [1]

1. 71 P. S. § 1710.1 et seq.

1968, July 31, P. L. 788, No. 241, § 7. As amended 1970, Jan. 12, P. L. (1969) 456, § 3; 1974, Dec. 30, P. L. —, No. 337, § 3, imd. effective.

1974 Amendment: Added subsec. (f.1).

§ 6009. Prohibited acts.

It shall be unlawful for any persons, municipality, county, or authority to:

(1) Dump or deposit, or permit the dumping or depositing of any solid wastes onto the surface of the ground or into the waters of the Commonwealth without having obtained a permit as required by section 7: [1] Provided, That this provision shall not prohibit the use of solid wastes in normal farming operations or in the processing or manufacturing of other products in a manner that will not create a public nuisance or adversely affect the public health: And, Provided further, That this provision shall not prohibit individuals from dumping or depositing solid wastes resulting from their own residential activities onto the surface of ground owned or leased by them when such wastes do not thereby create a public nuisance or adversely affect the public health.

(2) Construct, alter or operate a solid waste processing or disposal facility or area of a solid waste management system without a permit or other approval from the department or in violation of the rules, regulations, standards, or orders of the department.

(3) Burn solid wastes except in a manner approved by the Air Pollution Commission or the department.

(4) Store, collect, transport, process or dispose of solid waste contrary to the rules, regulations, standards or

1. Section 6007 of this title.

orders of the department or in such a manner as to create a public nuisance.

(5) Refuse or hinder entry and inspection by an agent or employe of the department after such agent or employe identifies himself and gives notice of his purpose.

(6) Transport or permit the transportation of any solid waste intended for disposal in mines without having obtained a permit as required by this act, or contrary to the rules, regulations, standards or orders of the department, or in such manner as to adversely effect or endanger the health, safety, environment or economy of the area of destination or of any area in Pennsylvania through which such transportation occurs.

(7) Dump or deposit or permit the dumping or depositing of any solid wastes into any mines of the Commonwealth without having obtained a permit as required by this act, or contrary to the rules, regulations, standards or orders of the department, or in such manner as to adversely effect or endanger the health, safety, environment or economy of the area.

(8) Transport or permit the transportation of solid waste into the Commonwealth for disposal in a mine located therein, or dump or deposit or permit the dumping or depositing into any mines of the Commonwealth, any solid waste so transported.

(9) Process as part of a solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

No person shall be held responsible under the provisions of this section for the dumping or depositing of any solid waste on ground owned or leased by him without his

expressed or implied consent, permission or knowledge. 1968, July 31, P. L. 788, No. 241, § 9. As amended 1970, Jan. 12, P. L. (1969) 456, § 5; 1974, Dec. 30, P. L. —, No. 337, § 4, imd. effective.

1974 Amendment: Added clause (9).

Rhode Island—*G. L.* 1956, § 23-46-6

23-46-6. Depositing of out of state refuse prohibited.

No person, firm or corporation engaged in the business of collecting and disposing of garbage, refuse or any form of waste from out of state residences or business facilities shall deposit such out of state garbage, refuse or waste at any public or private dumping facilities within the confines of this state. Violation of any of the provisions of this section shall be punishable by a fine not to exceed five hundred dollars ($500).

History of Section.

As assigned, P. L. 1970, ch. 65, § 1.

Vermont—24 *U. S. A.* § 2204 *et seq.*

§ 2204. Out-of-state collection.

(a) No person may dispose of or cause to be disposed of within the state any commercial or residential refuse, garbage or waste material collected or transported from outside of the state.

(b) A person who violates this section shall be fined not more than $100.00 for each offense.

(c) [Expired. January 1, 1972]

Added 1969, No. 36, § 1, eff. April 1, 1969.

§ 2205. —Exceptions.

Section 2204 of this title shall not apply to:

(1) agreements entered into by a municipality or planning commission on or before the effective date of this

act for the disposal or collection of refuse, garbage or waste material; or

(2) municipalities permitting the disposal of refuse, garbage or waste material from a contiguous municipality in another state provided that the other state has reciprocal provisions.—1969, No. 36, § 2, eff. April 1, 1969.

MOTION FILED

MAR 17 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW JERSEY

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE JURISDICTIONAL STATEMENT FILED BY THE APPELLANT CITY OF PHILADELPHIA, et al.,

and,

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

WILLIAM C. BRASHARES,
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Pursuant to Rule 42 of the Rules of the United States Supreme Court, the National Solid Wastes Management Association respectfully moves this Honorable Court for leave to file a brief in the captioned case

as amicus curiae in support of the Jurisdictional Statement filed by the City of Philadelphia et al., appellants herein, and to continue to participate as amicus curiae in this appeal should the Court assert jurisdiction. The brief which movant seeks leave to file is annexed to this motion.

Movant has received the written consent of counsel for the appellants herein to file a brief in this case as amicus curiae. Movant has requested the consent of appellees, State of New Jersey, Department of Environmental Protection et al. and was advised that appellees were not disposed to grant such consent at the present time and preferred to consider the participation of movant and any other potential amici at such later time as this Court might note probable jurisdiction of the subject cause. Due to the importance of the issues raised in this case to the business of movant's membership, movant has sought leave to file a brief at this time to support the assertion by this Court of jurisdiction.

The National Solid Wastes Management Association is a trade association based in Washington, D.C. which represents all major segments of private industry engaged in the solid waste field. This membership comprises over 2,000 contractor members, companies which are directly engaged in the collection, processing, transportation and disposal of residential and commercial waste material. Such members range from large, New York Stock Exchange–listed firms having operations throughout the United States to small family-operated one- or two-truck operators engaged in limited local markets. Aggregately, private industry engaged in solid waste collection and disposal is responsible for approximately half of the residential solid waste and

over 90 percent of the commercial and industrial liquid and solid waste collected and disposed of in the United States. *The Private Sector in Solid Waste Management, A Profile of Its Resources and Contribution to Collection and Disposal*, U.S. Environmental Protection Agency, SW-51d.1 (1973), p. 1.9. The Association's membership also includes owners and operators of landfill disposal facilities, manufacturers of virtually all types of equipment involved in the solid waste field and companies engaged in recovery of materials and energy from the solid waste stream. The Association is the recognized spokesman for the private solid waste industry before the federal government and state legislative and executive bodies and has participated extensively at all levels of government in the formulation of laws and policies dealing with improved environmental and economic standards for the collection, processing, disposal, and recovery of solid wastes.

The issues presented in the instant case have broad implication for the business of movant's membership and the quality and cost of the services they are able to provide to the public. Proper disposal of solid waste has become a serious and increasingly expensive undertaking, in some situations a crisis, throughout the country. In addition to the greater awareness of the potential hazards to public health and safety posed by irresponsible methods of disposal, more stringent air emmission standards have caused a closing down of incinerators throughout the country, thus causing even greater reliance upon land disposal. Increased attention to water pollution at federal and state levels has drawn attention to the effects of land disposal on underground water, a concern that has been intensified by the diversion of increasing volumes of liquid waste to land

disposal facilities where dumping into streams and rivers had been permissible.

In facing these environmental needs, states have pursued a broad range of solutions. Major focus has been given to long-term regional planning for waste disposal and land use. In many areas massive resource recovery programs have been initiated. These have been the directions urged and to some extent financed by the federal government through the Solid Waste Act of 1965, 42 U.S.C. §3251 et seq., and the Resource Recovery Act of 1970, 42 U.S.C. §3254 et seq., legislation premised upon the concept of cooperation among state and local governments to deal with a widespread problem that knows no state or local boundaries.

In a few instances, however, in desperation at the quantity of waste material to be absorbed and the difficulty in obtaining suitable land disposal sites due to increased public resistance and local zoning restrictions, resort has been made to laws or ordinances, such as that of the State of New Jersey in the instant case, to prohibit importation of waste material across state or other jurisdictional lines. Such action imposes immediate and direct restraints upon, and threatens economic injury to, private firms operating or using land disposal sites. It is a form of action that cannot be isolated. Jurisdictions deprived of access to traditional disposal sites beyond their boundaries will respond with similar barriers. Ten states have already instituted such import restrictions in one form or another,[1] and it is movant's understanding that many other states and local jurisdictions are considering similar measures but are

[1] Jurisdictional Statement, Appendix AA.

withholding action pending the outcome of this case. If the New Jersey Supreme Court's decision is allowed to stand, movant believes that non-importation legislation will proliferate, and that this regressive approach, rather than the positive regional approach sanctioned by Congress and now pursued by many states, will substantially dictate the future direction of solid waste management policies throughout the United States. The New Jersey statute presents a major impediment to sound forward-looking regional policies. This impediment will be eliminated by a decision of this Court that such a provision is in conflict with the commerce clause of the United States Constitution.

Wherefore, it is respectfully prayed that this motion for leave to file the annexed brief amicus curiae and to participate further as amicus curiae in this appeal be granted.

Respectfully submitted,

WILLIAM C. BRASHARES,
PAUL M. LAURENZA,
Cladouhos & Brashares
Attorneys for Amicus Curiae,
National Solid Waste
Management Association.

CERTIFICATE OF SERVICE

We hereby certify that on this day of March, 1976, three copies of this Motion for Permission to File Brief as Amicus Curiae of the National Solid Wastes Management Association in Support of the Jurisdictional Statement Filed by the Appellant City of Philadelphia, et al. were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By _____
William C. Brashares

By _____
Paul M. Laurenza

IN THE

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STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

QUESTIONS PRESENTED

The statement of questions presented set forth in the Jurisdictional Statement of Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

The nature and interest of this amicus curiae is set forth in the Motion for Permission to File Brief As Amicus Curiae of the National Solid Wastes Management Association in Support of the Jurisdictional Statement Filed by the Appellant City of Philadelphia, et al., to which this brief is annexed and is incorporated herein by reference.

ARGUMENT

A. Solid and Liquid Waste and the Services Related to Disposal of Such Wastes Substantially Involve Interstate Commerce.

This case involves interstate movement of a substantial mass of material which has value and purpose in the reclamation of land and the recovery of secondary materials and is the subject of constant interstate business activity by thousands of businesses across the country under increasingly rigid legal standards to ensure protection of public health and the environment. This is not a matter of threatened importation of articles of trade which "spread disease, pestilence and death," *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 489 (1888), and which this Court has found a state to be entitled to regulate without conflict with the commerce clause of the Constitution, Art. 1, Sec. 8, cl. 3. This Court has never held that the movement of ordinary waste material was outside the flow of commerce, and in lower federal court cases considering the relation of waste material to commerce

the substantial involvement in commerce of waste transportation and disposal services has been readily acknowledged. See *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3rd Cir. 1966), *cert. den.*, 384 U.S. 961 (1966); *Alexandria Scrap Corporation v. Hughes*, 391 F. Supp. 46 (D. Md. 1975).

The issue of waste material as a legitimate and important subject of interstate commerce can no longer seriously be argued. Congress has clearly recognized the interstate nature of solid waste problems and, as with air and water pollution programs, has demonstrated concern for coordinated solid waste planning that ignores jurisdictional boundaries. 42 U.S.C. §3251(b)(1); 42 U.S.C. §3254. Nor is waste material itself any longer considered a worthless discarded item. Its disposal as part of land reclamation, its increasing value for recovery of secondary materials or conversion to various forms of energy and its vastly increased regulation under federal and state environmental standards have established beyond question its substantial importance in the flow of interstate commerce. To argue otherwise would be to ignore not only the nature and potential value of the material but the realities of a major nationwide business intimately engaged in the daily flow of commerce.

B. P.L. 1973, c. 363, Poses A Classic Discrimination Against Interstate Commerce.

The New Jersey legislation in issue, P.L. 1973, c. 363, poses a classic and blatant discrimination against interstate commerce in violation of the commerce clause of the United States Constitution. This is not, we respectfully submit, a matter of balancing the exercise of legitimate state police power against any indirect

burden upon interstate commerce. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960). Rather, it is clearly and unambiguously a case of a state law regulating the disposition of material within the state solely and exclusively on the basis of its origin in another state. *Railroad Co. v. Husen*, 95 U.S. 465, 473 (1877).

The dilemma claimed by the state of New Jersey to be the basis for its non-importation legislation, and the fact that waste material by its nature may pose dangers to public health, cannot obscure the constitutional impasse the state has reached. New Jersey is asserting in the clearest and simplest terms that it has a limited resource, i.e., its land available for waste disposal, and that this resource cannot serve the citizens of New Jersey for the duration desired if it is also made available to citizens of other states. This is precisely the situation this Court has faced in earlier cases where states atempted to confine limited local resources to their own citizenry and where this Court has found a wholly impermissible discrimination against interstate commerce. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

A state cannot protect its local industry by prohibiting importation of identical competitive goods, *Guy v. Baltimore*, 100 U.S. 434, 443 (1879), or discouraging such competition through discriminatory taxes or other actions, *Robbins v. Taxing District of Shelby County*, 120 U.S. 489 (1887). Certainly a state could not limit access to its highways or public accommodations to its own citizenry on the ground that such facilities would be overburdened or rendered inadequate for its own citizens by permitting the access of citizens of other states. These are all, as is the

restriction presented in the instant case, a substitution of the state's own geographic and parochial interests for the constitutional mandate that commerce must flow freely across state lines. This presents no issue of balancing, because a statute that on its face clearly discriminates in the treatment of goods or material originating in the state as opposed to out of state is in hopeless conflict with the commerce clause, notwithstanding any police power justification claimed on the grounds of public health and safety.

While we are aware of no previous cases involving importation of solid waste which consider the federal constitutional issues presented here, the reasonableness of distinction between local and non-local waste material has been at issue in at least two state court decisions. In *Ex parte Lyons*, 27 Cal. App.2d 182, 80 P.2d 745 (D. Ct. of Apps., Cal. 1938), a criminal ordinance banning transportation of waste into Orange County, California was struck down under the state constitution as unjustly discriminatory where identical locally generated waste could be used for the same purpose, feeding hogs, as was the imported waste. In *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959), the Pennsylvania Supreme Court held a township ordinance prohibiting importation of waste invalid under the state constitution as arbitrary and discriminatory, finding that:

> [I]n effect the ordinance . . . declares that garbage from without, regardless of quantity, is harmful and deleterious, but that local garbage, regardless of amount, conforms more to the community's health and general welfare standards. The distinction sought to be made is both artificial and devoid of merit. 151 A.2d at 110.

New Jersey has based its complete obstruction to the interstate flow of solid waste on the same distinction as was found wanting in the California and Pennsylvania cases just cited, and in doing so has confronted the far more emphatic proscription of the U.S. Constitution on such discrimination. A state faced with depletion of a natural resource that it seeks to extend for the benefit of its own citizens must look to solutions other than blocking the flow of commerce. Increased disposal charges for all parties using New Jersey disposal sites, regardless of the origin of material, might well provide incentive for neighboring states to develop alternative sites. New Jersey itself might look to other potentially available land within its own borders or to development of resource or energy recovery programs that would help prolong the life of existing land disposal sites. These are all possibilities being explored in many states, and while they may represent planning and fiscal burdens, such burdens have never been found by this Court to permit a state to build walls at its borders in defiance of the United States Constitution.

CONCLUSION

The dilemma of New Jersey is not unique. It is part and parcel of an intense new national concern for the environment and the use and preservation of land. These are concerns that depend heavily for their resolution upon the constitutional philosophy that "the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). The Congress has given considerable encouragement for the states to swim together, and the Constitution, we submit, does not permit a state to opt

out of the collective endeavor by the creation of such barriers to commerce as New Jersey has chosen here as its own remedy. The National Solid Wastes Management Association as amicus curiae urges this honorable Court to recognize the substantial constitutional questions presented herein and the critical impact of this precedent of the New Jersey Supreme Court on the national effort to deal with this major area of environmental improvement, to assert jurisdiction in this appeal and to consider on the merits the implications of the subject law under the United States Constitution.

Respectfully submitted,

WILLIAM C. BRASHARES
PAUL M. LAURENZA
Cladouhos & Brashares
Attorneys for Amicus Curiae.

CERTIFICATE OF SERVICE

We hereby certify that on this day of March, 1976, three copies of this Motion for Permission to File Brief For National Solid Wastes Management Association as Amicus Curiae were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By _____
William C. Brashares

By _____
Paul M. Laurenza

Supreme Court, U. S.
FILED
JUN 3 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150.

CITY OF PHILADELPHIA, et al.,
Appellants,

v.

STATE OF NEW JERSEY, et al.,
Appellees.

On Appeal From the Supreme Court of the State of New Jersey

Jurisdictional Statement Filed February 13, 1976.
Probable Jurisdiction Noted April 5, 1976.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Date	*Pleadings*
1974	
Jan. 22	Complaint.
Jan. 30	Notice of Motion.
Jan. 30	Order as to restraints etc.
Feb. 4	Order granting Interlocutory Injunction.
Jan. 22	Order to show cause.
Feb. 13	Answer.
Feb. 19	Order to Intervene.
Mar. 11	Amended complt.
Mar. 21	Notice of Motion.
Mar. 27	Order for Summary Judgment.
Apr. 23	Notice of Motion.
Apr. 11	Order as to Hearing.
May 8	Order Denying Motion.
Aug. 6	(8) Affidavit.
Aug. 6	Copy of Affidavit.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Date	*Proceedings*
1974	
Apr. 23	NOTICE OF APPEAL.
May 8	1 copy of Trans.
July 9	Brief for Appl.: Appendix for Appl.
July 26	Notice of Motion for stay.
Aug. 8	Brief & Appendix in Opp.
Aug. 9	Brief & Appendix in Opp. (V. J. Dotoli).
Aug. 16	Order denying motion for stay; appeal shall be accelerated.
Aug. 21	Brief of Pltf-Respondent.
Aug. 23	Brief & Appx for Pltf-Intervenor Resp.
Sept. 5	Oral argument requested.
Oct. 15	Copy of order granting certification to Supreme Court.

SUPREME COURT OF NEW JERSEY

Date	*Proceedings*
1974	
Oct. 7	Order on Direct Certification & Consolidation with Hackensack Meadowlands Development Comm. v. Municipal Sanitary Landfill Authority (10,792). Received Ap. Div. Briefs. Brief of Appellant-Atty. Gen. Appendix of Appellants-Atty Gen. Brief of Plaintiffs-Respondents-Jamieson. Brief and Appendix for Plaintiff-Intervenor-Respondents. Dotoli, Esq.
Oct. 24	Letter of Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
1975	
Nov. 18	Opinion Mr. Justice Mountain 6-0 (J. Schreiber–out) 43 pp.
Nov. 18	Affidavits in support of temporary stay (Jamieson, Esqs.).
Nov. 20	Order granting temporary stay.
Nov. 26	Motion for stay and remand & Affts & Brief (Jamieson, McCardell, et al. Esq.).
Nov. 26	Motion for Stay (Vincent Dotoli, Esq.).
Dec. 5	Supplemental Affidavits (Jamieson, McCardell, et al.).
Dec. 8	Brief in response to Motions & Affidavits. (Stephen Skillman, Esq.).
Dec. 10	Supplemental Letter–J. M. M. P & S.
Dec. 11	Order denying Motion For Stay M-433-75.
Dec. 11	Order granting Motion For Remand M-434-75.
Dec. 11	Order denying Motion For Stay M-436-75.
Dec. 31	U. S. Supreme Court Order Staying Judgment.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Date	*Pleadings*
1975	
Dec. 22	Order dis. compl't (in part) etc.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION

Docket No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa., CITY OF GLEN COVE, a municipal corp. of the State of N. Y., LANDFILL and DEVELOPMENT COMPANY, a N. J. corp., MAC SANITARY LANDFILL, INC., a N. J. corp., KINSLEY'S LANDFILL, INC., a N. J. corp. & DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corp.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Arthur Meisel, Esquire, attorneys of the plaintiffs, notice having been informally given to the Office of the Attorney General of New Jersey, and it appearing to the Court from the duly verified complaint and the affidavits annexed thereto that immediate and irreparable damage will probably result to the plaintiffs before a hear-

ing can be had on an application for a temporary restraining order in this action:

It is on this 21st day of January, 1974,

ORDERED, that the defendants show cause before the Superior Court, Law Division, at the Mercer County Court House, South Broad and Market Streets, Trenton, N.J. on the 1st day of February, 1974 at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard why an injunctive order should not be issued restraining and enjoining the defendants according to the demand of the complaint until the final hearing of this action.

IT IS FURTHER ORDERED, that the defendant, Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management and that the State of New Jersey desist and refrain from enforcing the provisions of P. L. 1973, c. 363 until the constitutionality of same has been determined, and that said restraints apply to defendants and their agents, employees, servants and attorneys.

IT IS FURTHER ORDERED, that the defendants have leave to move for a dissolution or modification of the restraints hereby imposed on 2 days notice to the plaintiffs.

IT IS FURTHER ORDERED, that true but uncertified copies of the complaint and the affidavits attached thereto and of this order be served upon the defendants within 2 days from the date hereof.

GEORGE Y. SCHOCH

J. S. C.

COMPLAINT IN LIEU OF PREROGATIVE WRITS.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION

DOCKET No. L 15068.73 P. W.
Civil Action

CITY OF PHILADELPHIA, a municipal corporation of the Commonwealth of Pennsylvania, CITY OF GLEN COVE, a municipal corporation of the State of New York, LANDFILL AND DEVELOPMENT COMPANY, a New Jersey corporation, MAC SANITARY LANDFILL, INC., a New Jersey Corporation, KINSLEY'S LANDFILL, INC., a New Jersey corporation, and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a New Jersey Corporation,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

Plaintiffs, City of Philadelphia, c/o David J. Damiano, Commissioner, Department of Streets, 340 Municipal Services Building, Philadelphia, Pennsylvania, 19107, City of Glen Cove, c/o David Quient, Esq., City Attorney, 5 Highland Road, Glen Cove, New York, 11542, Landfill and Development Company, Route 38, R. D. #1, Mt. Holly, New Jersey, M. A. C. Landfill, Inc., Routes 41 and Clements Bridge Road, Deptford, New Jersey,

Kinsley's Landfill, Inc., Routes 41 and 47, Deptford, New Jersey and DeLorenzo-Insterstate Waste Removal Co., Inc., 208 Paterson Avenue, Trenton, New Jersey, in complaining against defendants, say:

COUNT I.

1. Plaintiff landfills are public utilities of the State of New Jersey and hold duly issued temporary certificates of public convenience and necessity issued by the New Jersey Public Utility Commission.

2. Each said landfill duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a sanitary landfill registration certificate pursuant to N. J. A. C. 7:26-2.2 &c.

3. Plaintiff Landfill and Development Company operates a sanitary landfill on a tract of land consisting of approximately 200 acres situated in the Townships of Mount Holly, Eastampton and Lumberton in the County of Burlington and State of New Jersey, which landfill site has been leased from plaintiff DeLorenzo-Interstate Waste Removal Co., Inc.

4. Plaintiff M. A. C. Landfill, Inc. operates a sanitary landfill on a tract of land consisting of approximately 87 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

5. Plaintiff, Kinsley's Landfill, Inc., operates a sanitary landfill on a tract of land consisting of approximately 380 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

6. Each landfill treats and disposes of solid waste which originated or was collected outside the State of New Jersey, including considerable solid waste collected in the City of Philadelphia, Pennsylvania.

7. Plaintiff City of Philadelphia has entered into a written agreement with each of the aforesaid plaintiff landfills for the treatment and disposal of a substantial portion of its sold waste. Plaintiff City of Glen Cove disposes of a substantial portion of the solid waste originating or collected in said city in sanitary landfills located in the State of New Jersey.

8. By virtue of the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 *et seq.*, the Department of Environmental Protection of the State of New Jersey was granted the power and authority to promulgate rules and regulations governing solid waste disposal in the State of New Jersey.

9. On February 21, 1973, the Governor of the State of New Jersey approved A. 1132 (P. L. 1973, c. 39) known as the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

10. Said Act, which became effective March 1, 1973, is entitled as follows:

> AN ACT to control and regulate the treatment and disposal within this State of solid and liquid waste collected outside the State, empowering the Commissioner of Environmental Protection to adopt rules and regulations and prescribing penalties for violations.

11. Pursuant to paragraph 4 of the Waste Control Act, the Commissioner of Environmental Protection is granted the power to prohibit "the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State". N. J. S. A. 13:1I-4a.

12. In accordance with the authority conferred by N. J. S. A. 13:1E-1 *et seq.* and N. J. S. A. 13:1I-1 *et seq.*, and as part of a proposed Revision to the Rules of the Bureau of Solid Waste Management, the Commissioner of Environmental Protection proposed as follows:

7:26-1.8 *Out of State Waste*

—1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

—1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

13. The effect of the aforesaid portion of the proposed rule is to completely prohibit the disposal in the State of New Jersey of any solid waste which originated or was collected outside the territorial limits of the State.

14. The principal basis and background advanced by the Department of Environmental Protection to support the proposed prohibition was to assure the availability of landfill acres in New Jersey for solid waste generated in this State, and was an incident thereto, to stabilize the cost of solid waste collection and disposal for New Jersey residents.

15. The power and authority to regulate the rates and public utility aspects of the solid waste collection and disposal industry has been conferred upon the Board of Public Utility Commissioners pursuant to the Solid Waste Utility Control Act of 1970, N. J. S. A. 48:13A-1 *et seq.*

16. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and an unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

17. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State; and there is no difference with respect to the treatment or disposal of same.

18. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 hereof, if adopted and enforced, would be and constitute an undue burden upon interstate commerce in violation of Art. 1, Sec. 8., Cl. 3 of the United States Constitution.

19. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

20. Plaintiffs will suffer immediate and irreparable injury, loss or damage if the proposed rule prohibiting the importation of out-of-state waste set forth in paragraph 12 hereof is adopted and enforced.

21. In the event plaintiff landfills are prohibited to dispose of solid waste which originated or was collected outside the territorial limits of this State, the continued operation of said sanitary landfills may be and become economically unfeasible, thereby impairing the public interest.

22. Plaintiffs must obtain equitable relief because they do not have an adequate remedy at law.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT II.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out of state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT III.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on the face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and

successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT V.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 4, Sec. 7, Par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C.-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an arbitrary, capricious and unreasonable exercise of power by an administrative agency, thereby denying plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed

rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive of the First Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. The New Jersey Legislature has conferred sweeping authority upon appropriate public bodies to regulate the treatment and disposal of solid waste in New Jersey, for the purpose of assuring a sanitary method of disposing of solid waste and thereby protecting the public health, safety and welfare.

3. N. J. S. A. 26:1A-7 provides, in part, that the Public Health Council, established within the Department of Health of the State of New Jersey, shall have power to establish reasonable sanitary regulations, and that the body of regulations so established shall be called the State Sanitary Code.

4. By virtue of said authority and in accordance with the applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, a revision of Chapter VIII of the State Sanitary Code, exclusively concerned with refuse disposal, was adopted by the Public Health Council to become effective July 1, 1970.

5. Section 6 of the Solid Waste Management Act (1970) N. J. S. A. 13:1E-6b provides, in pertinent part, as follows: "All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department (of environmental protection), subject to its power as herein provided to amend or repeal the same."

6. By virtue of the authority granted by the applicable provisions of the Solid Waste Management Act (1970), (N. J. S. A. 13:1E-1 *et seq.*) and the Waste Control Act (N. J. S. A. 13:1I-1 *et seq.*) and in accordance with applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, the Department of Environmental Protection held hearings in two parts during December, 1973 on proposed solid waste management regulations.

7. Said proposed regulations do not expressly amend or repeal Chapter VIII of the State Sanitary Code.

8. In addition to the aforesaid, N. J. S. A. 13:1E-17, being a supplement to the Solid Waste Management Act (1970) provides, in pertinent part, as follows: "No ordinances or regulations of any governing body of a municipality or county or board of health more stringent than this act or any rules or regulations promulgated pursuant hereto, and relating to health and environmental protection aspects of solid waste collection or solid waste disposal, shall be superseded by this act."

9. A similar provision with respect to the provisions of the State Sanitary Code was enacted in 1947, N. J. S. A. 26:1A-9.

10. On January 2, 1974, the Governor of the State of New Jersey approved S. 2367 (P. L. 1973, c. 363) being a

supplement to the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

11. Said Act, which will become effective February 1, 1974, is entitled as follows:

> An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

12. The text of said Act provides as follows:

> (1) The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatement and disposal within this State of all wastes generated outside of the State be prohibited.
>
> (2) No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973, c. 39.

13. In enacting a law prohibiting the importation of out-of-state waste, the principal concern of the New Jersey Legislature was to preserve landfill acres in New Jersey for solid waste generated in this State.

14. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within this State; and there is no difference with respect to the treatement or disposal of same.

15. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and the unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

16. Inasmuch as the disposal of solid waste is a problem of national scope and concern, the Congress of the United States has directed the Secretary of Health, Education and Welfare to encourage interstate and interlocal cooperation in connection with solid waste disposal problems. 42 U. S. C. A. § 3254.

17. P. L. 1973, c. 363 constitutes an undue burden upon interstate commerce in violation of Art. 1, Sec. 8, Cl. 3 of the United States Constitution.

18. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

19. Plaintiffs repeat the allegations contained in paragraphs 20 through 22 inclusive of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IX.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive, and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes the taking of private property for public use without just compensation in violation of Amendment 5 and Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT X.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363, constitutes the taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contracts, in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contract in violation of Art. 4, Sec. 7, par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Inasmuch as more than one object is embraced by P. L. 1973, c. 363, said enactment violates Art. 4, Sec. 7, Par. 4 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Section 2 of P. L. 1973, c. 363 contains an unconstitutional delegation of legislative power in violation of Amendment 14 of the United States Constitution, and Art. 4, Sec. 1, Par. 1, of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is so vague and uncertain as to deny plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is violative of due process of the law as constituting an arbitrary, capricious and unreasonable exercise of power by the Legislature, as provided in Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is void for failure to provide adequate standards to an administrative agency in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIX.

1. N. J. S. A. 13:1I-4a provides as follows:
The commissioner shall have the power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.

2. The power to prohibit, as distinguished from the power to regulate, the incineration or landfill of solid waste and the treatment or disposal of liquid waste has been preempted by the federal government.

WHEREFORE, plaintiffs demand judgment:

a. Declaring the grant of power to prohibit the treatment or disposal of solid and liquid waste contained in N. J. S. A. 13:1I-4a unconstitutional.

b. That this Court grant costs of suit; and

c. That such other relief be granted by the Court as seems to it just and equitable.

Jamieson, Walsh, McCardell, Moore & Peskin
A Professional Corporation
By /s/ HERBERT F. MOORE
Herbert F. Moore

AFFIDAVIT OF DAVID J. DAMIANO.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation, and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

COUNTY OF
COMMONWEALTH OF PENNSYLVANIA } *ss.:*

DAVID J. DAMIANO, of full age, being duly sworn according to law, upon his oath says:

1. I am the Commissioner of the Department of Streets of the City of Philadelphia, Pennsylvania, one of the above-named plaintiffs.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforcement of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. P. L. 1973, c. 39 prohibits the treatment and disposal within the State of New Jersey of all wastes generated outside of said state, and further provides, in pertinent part, as follows:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

4. Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management by the Commissioner of the Department of Environmental Protection provide that no person engaged in the collection and/or haulage of solid waste shall dispose of, and no person owning or operating a solid waste facility located within the State of New Jersey shall accept for disposal any solid waste which originated or was collected outside the State of New Jersey.

5. A substantial portion of the solid waste which originates or is collected in the City of Philadelphia is treated and disposed of in the State of New Jersey.

6. The City of Philadelphia has entered into written agreements with Landfill and Development Company,

M. A. C. Landfill, Inc. and Kinsley's Landfill, Inc., public utilities of the State of New Jersey which hold temporary or permanent registration certificates duly issued by the New Jersey Department of Environmental Protection for the treatment and disposal of the solid waste originating in or collected in Philadelphia.

7. P. L. 1973, c. 363 will become effective February 1, 1974.

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to that date (a) determine that solid or liquid waste originating from outside of New Jersey can be brought into said state without endangering the public health, safety and welfare, and (b) promulgate regulations permitting and regulating the treatment and disposal of foreign waste, then the only alternative presently available to the City of Philadelphia would be to incinerate its solid waste. The incinerators located within the City of Philadelphia if operated would presently violate Federal Air Pollution Standards, and, if used, would create a serious and hazardous air pollution problem involving the City of Philadelphia, the Commonwealth of Pennsylvania and the State of New Jersey, and would endanger the health and welfare of the inhabitants thereof. Under present air pollution standards, the lawful and safe operation of the said incinerators cannot be obtained within the foreseeable future.

9. There are no other alternative facilities available for the disposal of the solid waste originating in the City of Philadelphia other than the facilities located within the State of New Jersey, at the present time.

10. In any event, if other suitable facilities could be located at some future date, the City of Philadelphia does not own a sufficient number of suitable vehicles to transport said solid waste material for disposal. Vehicles suitable for the transportation of solid waste material are not inordinately expensive, but are custom vehicles, constructed in accordance with rigid specifications, which must be specially ordered. The said vehicles are not readily available for purchase in the open market. There is at this time, a minimum 400 day waiting period required for delivery of said vehicles, absent strikes, availability of material, or other contingencies beyond purchaser's control.

11. Unless defendants are enjoined and restrained from prohibiting the treatment and disposal in New Jersey of waste collected outside of that state, the City of Philadelphia will suffer great, immediate and irreparable damage, in that solid waste will accumulate in said City and cause a serious hazard to the health, safety and welfare of the people thereof.

DAVID J. DAMIANO
David J. Damiano

Sworn to and subscribed before me this 16th day of January, 1974.

JANET ALTHOUSE
Janet Althouse
Notary Public,
Philadelphia, Philadelphia Co.
My Commission Expires February 5, 1977

AFFIDAVIT OF VINCENT SUOZZI.

(January 10, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation, and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

STATE OF NEW YORK }
COUNTY OF NASSAU } *ss:*

VINCENT SUOZZI, being duly sworn, deposes and says:

1. I am the Mayor of the City of Glen Cove, New York, one of the above-named plaintiffs.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a

motion for an order temporarily restraining the enforcement of S. 2367, as enacted by the State of New Jersey, and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. Enforcement of S. 2367, or adoption and enforcement of proposed N. J. A. C. 7:26-1.8, would prohibit the treatment or disposal in New Jersey of solid waste generated or collected outside that State.

4. A substantial portion of the solid waste which originates or is collected in the City of Glen Cove is treated and disposed of in the State of New Jersey.

5. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974, (a) promulgate regulations permitting and regulating the treatment and disposal of solid and liquid waste in the State of New Jersey, and (b) determine that solid or liquid waste which originated or was collected outside the State of New Jersey may be brought into said State without endangering the public health, safety and welfare, then the City of Glen Cove will have to find a suitable alternate plan for the disposal of its solid waste.

6. A suitable alternate plan cannot be developed prior to February 1, 1974, or in the foreseeable future.

7. Unless defendants are enjoined and restrained during the pendency of this action from prohibiting the treatment and disposal in New Jersey of waste collected outside of that State, plaintiff, City of Glen Cove, will suffer great and irreparable damage, in that solid waste

will accumulate in said city and cause a serious hazard to the health, safety and welfare of the people thereof.

VINCENT SUOZZI
Vincent Suozzi

Sworn to and subscribed before me this 10th day of January, 1974.

DAVID QUIENT
David Quient, Notary Public
State of New York #30-8466700
Commission expires 3/30/74

AFFIDAVIT OF RICHARD A. PELUSO.
(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed almost all course work toward a doctor's degree in said field.

3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

5. As a general rule, there is a direct relationship between the length of time consumed in bringing a sanitary landfill to final grade including placement of the final impermeable cover thereon, and the potential for environmental pollution.

6. If the effect of P. L. 1973, c. 363, or proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 is to reduce the volume of solid waste treated and disposed of in New

Jersey and thereby extend the time within which landfills are brought to final grade and final cover then such statute and proposed rules may have the effect of increasing, rather than decreasing such danger as may exist to the quality of the environment.

7. In the event the court would grant restraints enjoining the enforcement of P. L. 1973, c. 363, or the adoption or enforcement of proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, the public health, welfare and safety would in no way be jeopardized provided said waste continued to be treated and disposed of in accordance with the terms of applicable Federal and New Jersey state and administrative laws, rules and regulations.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 16th day of January, 1974.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn according to law, upon his oath says:

1. I am the President of Landfill and Development Company (hereinafter L & D), a public utility of the State of New Jersey holding a duly issued temporary Certificate of Public Convenience and Necessity by the New Jersey Public Utilities Commission. L & D duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a Sanitary Landfill Registration Certificate, and a temporary certificate was duly issued by said Department.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforcement of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. The disposal of solid waste is governed by Chapter VIII, "Refuse Disposal" of the New Jersey State Sanitary Code, which Code is enforced by the aforesaid Department of Environmental Protection.

4. In accordance with authority conferred by N. J. S. A. 13:1E-1 et seq. and N. J. S. A. 13:1I-1 et seq., the said Department of Environmental Protection proposed a comprehensive revision to the Rules of the Bureau of Solid Waste Management which would further govern and regulate the operation of sanitary landfills in New Jersey, including the treatment and disposal of solid waste therein.

5. L & D has entered into a written contract with the City of Philadelphia pursuant to which L & D has agreed to treat and dispose of a stated quantity of solid waste which originates or is collected in said City.

6. Section 7:26-1.8.2, being one section in the aforesaid proposed Revision to the Rules of the Bureau of Solid Waste Management, provides that,

"no person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside of the territorial limits of this State."

7. In addition, P. L. 1973, c. 363 which will become effective February 1, 1974, provides that no wastes generated outside of the State of New Jersey shall be treated or disposed of within said State, and further provides as follows:

"No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974 (a) determine that waste which originates or was collected outside of New Jersey can be disposed of within said state without endangering the public health, safety and welfare and (b) promulgates regulations permitting and regulating the treatment and disposal of such waste, then L & D will be prohibited from the further treatment and disposal of waste in accordance with the terms of its written contract with the City of Philadelphia.

9. If L & D is prohibited from fulfilling the terms of its obligations with the City of Philadelphia, it will lose very substantial and considerable profits, and will suffer

grievous damages, the amount of which cannot be calculated with any reasonable certainty.

Based upon existing regulations governing the treatment and disposal of solid waste, the State of New Jersey will not be materially or substantially adversely affected by the issuance of a temporary restraining order, while on the other hand, the business of L and D would be grievously and substantially affected if such restraining order was not granted.

10. Upon information and belief the proposed Rule 7:26-1.8.2 and P. L. 1973, c. 363 was motivated by a desire on the part of the State of New Jersey to assure the availability of landfill acres in New Jersey for solid waste generated in that state and, as an incident thereto, to stabilize the cost of solid waste disposal for New Jersey residents. Said information and belief is based upon (a) a statement by the New Jersey Department of Environmental Protection appearing on pages 7 and 8 of a document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", a copy of which section is attached hereto and made part hereof as Exhibit A, and, (b) the last paragraph of a letter dated December 16, 1973 from Richard W. DeKorte, Counsel to the Governor to David Quient, Esquire, City Attorney of the City of Glen Cove, which states that S. 2367 (O. C. R.) (now P. L. 1973, c. 363) would not be introduced "had the sister states of New Jersey permitted solid wastes originating in our state to be disposed of at or near the point of origination." A copy of said letter is attached hereto and made part hereof as Exhibit B.

11. Accordingly, both P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 appear to be retaliatory in nature and not actually based

upon the immediate potential for harm to the health of the community.

12. Federal legislation encourages interstate and regional solutions, where applicable, to solid waste disposal and recovery as evidenced by 42 U. S. C. A. § 3254, a copy of which is attached hereto as Exhibit C.

13. In addition to the aforesaid, if L & D is prohibited from disposing of solid waste which originated or was collected outside of New Jersey, the continued operation of said sanitary landfill may be and become economically unfeasible, thereby impairing the public interest.

LEO F. HUGHES, 3RD
Leo F. Hughes, 3rd

Sworn to and subscribed before me this 16th day of January, 1974.

ARTHUR MEISEL
Arthur Meisel
Attorney at Law of New Jersey

Exhibit A.

• • •

IV. *Out-of-State Waste*

In 1971, at least 1¼ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that

same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

• • •

Exhibit B.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

RICHARD W. DEKORTE
Counsel for the Governor

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 13, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Richard W. DeKorte
Counsel to the Governor

Encl.
cc: Richard J. Sullivan, Commissioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

Exhibit C.

§ 3254. Encouragement of interstate and interlocal cooperation

The Secretary shall encourage cooperative activities by the States and local governments in connection with solid-waste disposal programs; encourage, where practicable, interstate, interlocal, and regional planning for, and the conduct of, interstate, interlocal, and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal.

AFFIDAVIT OF SAMUEL HALE.

(January 15, 1974.)

STATE OF MASSACHUSETTS }
COUNTY OF SUFFOLK } *ss.:*

I, Samuel Hale, being duly sworn, depose and say, under the penalties and pains of perjury:

1. That I am a Vice President of SCA Services, Inc. ("SCA"), a nationwide waste service company with over 90 waste service operating centers located in 35 states;

2. That, prior to the commencement of my employment with SCA on October 3, 1973, I was, from October 1, 1971, Deputy Assistant Administrator for Solid Waste Management Programs of the United States Environmental Protection Agency;

3. That, to the best of my knowledge and belief, substantial quantities of chemical wastes, predominately liquid, generated within the State of New Jersey have been and are continuing to be transported to and disposed of within states other than the State of New Jersey, including, without limitation, the States of New York, Connecticut, Pennsylvania and Maryland;

4. That, to the best of my knowledge and belief, there is pending before the United States Senate, Senate Bill 1086, known as the "Hazardous Waste Management Act of 1973", proposed by the Administration, which, in Section 14(b) thereof, contains provisions which, if enacted, would limit the powers of states and municipalities to prohibit the importation of hazardous wastes. A copy of said Section 14(b) is attached hereto as Exhibit A;

5. That, to the best of my knowledge and belief, there is pending before the United States Senate, Senate Bill 1879, as revised, known as the "Solid Waste Source Reduction and Recycling Incentives Act of 1973", proposed by the Senate Commerce Environment Subcommittee, which, if enacted, would prohibit "restrictions on interstate transport of wastes for treatment or disposal . . ." (*Solid Waste Report*, November 26, 1973).

In witness whereof, I have hereunto set my hand this 15th day of January, 1974.

SAMUEL HALE
Samuel Hale

Subscribed and sworn to before me this 15th day of January, 1974.

SAMUEL P. HUNT, III
Samuel P. Hunt, III
Notary Public
My Commission Expires: Dec. 27, 1980

Exhibit A.

STATE AUTHORITY

SEC. 14.

• • •

(b) No State or municipality shall impose, on wastes originating in other States or municipalities, requirements respecting the transport of such wastes into or disposal within its jurisdiction which are more stringent than those requirements applicable to wastes originating within such receiving States and municipalities.

• • •

STATEMENT OF ACTING GOV. ALFRED N. BEADLESTON.

FROM THE OFFICE OF THE GOVERNOR

October 19, 1973 FOR IMMEDIATE RELEASE

I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Gov. William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other State. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible.

AFFIDAVIT OF ARSEN J. DARNAY.
(January 29, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove, a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp., Kinsley's Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT.

DISTRICT OF COLUMBIA } *ss.:*

ARSEN J. DARNAY, of full age, being duly sworn according to law, deposes and says:

1. I am the Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency.

2. The statements on the attached letter to Mr. Herbert F. Moore dated January 29, 1974 are all true to my personal knowledge.

ARSEN J. DARNAY
Arsen J. Darnay

Sworn to and Subscribed before me this 29 day of January, 1974.

A. BLAKEMAN EARLY
A. Blakeman Early
Attorney at Law of the District of Columbia

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

Mr. Herbert F. Moore, Esq.
Jamieson, Walsh, McCardell, Moore and Peskin
One West State Street
Trenton, New Jersey 08608

Dear Mr. Moore:

In connection with current litigation in which you are engaged with the State of New Jersey, you have requested a statement of this Agency's position on the legislative action by the State of New Jersey which will prohibit as of February 1, 1974, the importation into the State of any solid or liquid waste originating or collected outside the State. I understand also that the State has adopted under its emergency procedures implementing regulations which with some narrow exceptions, will ban importation for land disposal of any such waste. Thus, it would appear

that the treatment and disposal within New Jersey of most wastes generated outside the State will be illegal and subject to severe enforcement penalties as of February 1, 1974.

It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitious passage and implementation of this statute and these regulations.

If this statute and implementing regulations are allowed to become effective February 1, the City of Philadelphia would significantly increase and continue the incineration of its solid waste. The incineration of such quantities of solid waste would result in the emission of particulate matter in violation of health related air quality standards and the Clean Air Act of 1970. (See Affidavit of Mr. David J. Damiano, Commissioner of Streets, City of Philadelphia, page 3.)

Representatives of EPA have testified on two occasions on other proposals to ban the importation and disposal in New Jersey of out-of-state wastes. Copies of the statements of Meyer Scolnick before the Hackensack Meadowlands Development Commission on June 18, 1973, and of John A. Ruf before the New Jersey Department of Environmental Protection on December 13, 1973, are enclosed. These statements, together with this letter, represent the position of the Environmental Protection Agency. Copies will be distributed to the State and to others who have expressed an interest in this matter.

In brief, EPA's position is that a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid

Waste Disposal Act, the administration of which law is an EPA responsibility. The EPA Administrator is charged with encouraging (1) cooperative activities by the States and local governments in connection with solid waste disposal programs; (2) interstate, inter-local, and regional planning for, and the conduct of, interstate, inter-local and regional waste disposal programs; and (3) the enactment of improved and, so far as practical, uniform state and local laws governing solid waste disposal. The New Jersey legislation will work at cross purposes with the plans and goals EPA is striving to implement under the role given to it by the Solid Waste Disposal Act. Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

While the concerns of the several States as to the growing scarcity of landfill disposal sites are understandable, restrictions on out-of-state wastes reflect a narrow, parochial view without due regard to more significant problems and values involved in the national policy in favor of regional planning for solid waste disposal consistent with the achievement of environmental quality goals on a regional basis in this and the related environmental areas in which EPA is making efforts to combat water pollution under the Federal Water Pollution Control Act Amendments of 1972 and air pollution under the Clean Air Act. Environmental planning in the opinion of this Agency means regional planning and not restrictive legislation by a jurisdictional entity in its own short-range self interest. This means that solid waste processing and disposal facilities should be planned, designed and constructed so as to serve "waste sheds" which may encompass more than one city or State, and not merely the jurisdictional entity in which it is located or in which the waste is generated.

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

The control of available landfill sites development in light of land use planning as reflected in State laws, regulations and policies in such areas as "wetlands" preservation, area development (such as in the Hackensack Meadowlands), open-space, recreational, agricultural and park area designations and zoning and growth development planning are admirable efforts of environmental control provided such efforts take into account the total environmental picture and address the significant problems of air quality, water quality, waste water treatment as well as solid waste treatment and disposal. A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices.

Sincerely yours,

ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator
for Solid Waste Management Programs
(HM-562)

AFFIDAVIT OF RICHARD A. PELUSO AND DENNIS G. FENN.

(January 31, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO and DENNIS G. FENN, being duly sworn upon their oaths, according to law, depose and say:

1. I, Richard A. Peluso, am a professional engineer licensed to practice in the State of New Jersey.

I, Dennis G. Fenn, am a civil engineer practicing in the State of New Jersey.

2. I, Richard A. Peluso, hold a master's degree in Environmental Engineering and have completed almost all course work toward a doctor's degree in said field, and have had in excess of five years experience in the field of solid waste management.

I, Dennis G. Fenn, hold a master's degree in Environmental Engineering and have over three years experience in the field of solid waste management.

3. In the event plaintiffs are required to remove solid waste previously disposed of in a sanitary landfill facility it would be necessary to open a face in the landfill, which would seriously increase the potential danger to both the health of the residents of the State of New Jersey and the quality of the environment of said State.

4. The principal hazards precipitated by such removal includes a proliferation of leachete, vermin and rats, and the creation of serious odor problems.

5. There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill purposes which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection.

6. A typical sanitary landfill consisting of 200 acres, and operated in compliance with the regulations of the New Jersey Department of Environmental Protection would remain fully operational to dispose of 10,000 tons of solid waste per week for a period of approximately 15 years.

RICHARD A. PELUSO
Richard A. Peluso
DENNIS G. FENN
Dennis G. Fenn

Sworn to and Subscribed before me this 31st day of January, 1974.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires (illegible)

AFFIDAVIT OF MILTON BERKES.

(January 29, 1974.)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } ss.:

Milton Berkes being duly sworn upon his oath according to law deposes and says:

1) I am a Legislator from the 140th Assembly District of the Commonwealth of Pennsylvania elected from Bucks County.

2) I have personal knowledge of the matters contained herein.

3) I have, this twenty-ninth day of January, 1974, introduced into the House of Representatives of the Commonwealth of Pennsylvania a bill designated as House Bill No. 1831, a true copy of which is attached hereto and made a part hereof.

4) The intent of this legislation is to retaliate against any state that refuses to accept solid or liquid waste, for treatment or disposal, that originates within the Commonwealth of Pennsylvania.

MILTON BERKES
Milton Berkes

Sworn and subscribed to before me, a notary public of the Commonwealth of Pennsylvania this 29th day of January, 1974.

EUNICE F. JOHNSON
NOTARY PUBLIC
My Commission Expires Sept. 13, 1976
Hershey, Pa. Dauphin County

AN ACT

Amending the act of July 31, 1968 (P. L. 788, No. 241), entitled "An act providing for the planning and regulation of solid waste storage, collection, transportation, processing and disposal systems; requiring municipalities to submit plans for solid waste management systems in their jurisdiction; authorizing grants to municipalities; requiring permits for operating processing or disposal systems; imposing duties on and granting powers to municipalities; authorizing the Department of Health to adopt rules, regulations, standards and procedures; creating an advisory committee; providing remedies, prescribing penalties, and making an appropriation," prohibiting the treatment and disposal within the State of solid waste collected from a state that does not accept waste from this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6, act of July 31, 1968 (P. L. 788, No. 241), known as the "Pennsylvania Solid Waste Management Act," is amended by adding a clause to read:

Section 6. Powers and Duties of the Department.—The department shall have the power and its duty shall be to:

• • •

(10) Develop methods to identify the source of any solid waste which is part of the process of a solid waste management system to prevent any solid waste collected from another state that does not accept solid waste from this Commonwealth from being processed as part of such solid waste management system.

Section 2. Section 7 of the act is amended by adding a subsection to read:

Section 7. Applications and Permits.—• • •

(f. 1) The department shall refuse any application from and shall not grant any permit to any person, municipality, county or authority which includes as part of its solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 3. Section 9 of the act is amended by adding, before the last paragraph, a clause to read:

Section 9. Prohibited Acts.—It shall be unlawful for any person, municipality, county, or authority to:

• • •

(9) Process as part of a solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 4. This act shall take effect immediately.

AFFIDAVIT OF JOHN P. FAZZIO.

(January 30, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DE LORENZO—INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, JOHN P. FAZZIO, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am the President of John P. Fazzio, Inc., trading as John P. Fazzio Landfill Co., a solid waste disposal utility of the State of New Jersey.

2. I make this affidavit in support of a Motion for Intervention in the above-captioned matter and I have personal knowledge of the matters hereinafter referred to.

3. Since 1969 the John P. Fazzzio Landfill Co. has been accepting waste that has been generated within the State of Pennsylvania and this has been done under the regulation of the New Jersey Department of Environmental Protection.

4. About seventy-five (75%) per cent of all waste deposited at the John P. Fazzio Landfill Co. originates in the State of Pennsylvania.

5. If P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 are enacted, it will cause serious, immediate and irreparable injury to John P. Fazzio Landfill Co. and could cause John P. Fazzio Landfill Co. to go into bankruptcy because of these severe and abrupt reductions in revenue. If John P. Fazzio Landfill Co. did become bankrupt and had to go out of business because of the enactment of P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, it would have damaging effects upon the various municipalities in the State of New Jersey who use the disposal services of the John P. Fazzio Landfill Co.

6. Furthermore, if P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 are enacted, it will have a serious effect upon the numerous waste collectors who collect waste in the State of Pennsylvania and deposit said wastes in the State of New Jersey. Furthermore, the enactment of P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 may have the effect of placing these waste collectors in a situation in which they will have no place to deposit their said wastes.

7. The lack of adequate and sufficient disposal areas in the State of Pennsylvania could cause a severe health crisis to the residents of the City of Philadelphia, in particular those residents of the City of Philadelphia who have their solid waste collected by collectors who dispose of same in the State of New Jersey.

JOHN P. FAZZIO.
John P. Fazzio.

Sworn and subscribed to before me this 30th day of January, 1974.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

AFFIDAVIT OF DAVID L. BENNETT.

(January 30, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DE LORENZO—INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, DAVID L. BENNETT, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am the President of Continental Vanguard, Inc., a waste collection utility of the State of New Jersey.

2. I make this affidavit in support of a Motion for Intervention in the above-captioned matter and I have personal knowledge of the matters hereinafter referred to.

3. Continental Vanguard, Inc. collects wastes from various companies and corporations located within the State of Pennsylvania.

4. Continental Vanguard, Inc. provides waste removal services to companies and corporations that are located within the State of Pennsylvania which manufacture and process commodities which are destined for interstate commerce.

5. The collection and removal of these wastes from said companies and corporations that are located within the State of Pennsylvania which manufacture and process commodities which are destined for interstate commerce are necessary and vital to the continued manufacture and processing of these said commodities.

DAVID L. BENNETT.
David L. Bennett.

Sworn and subscribed to before me on this 30th day of January, 1974.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

AFFIDAVIT OF BERNHARDT V. LIND.

(January 30, 1974.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

BERNHARDT V. LIND, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Chief of the Bureau of Solid Waste Management within the Department of Environmental Protection. In that position I am responsible for the administration of the Department's programs with respect to the management of solid waste collection and disposal in New Jersey.

2. The figures available to the Department indicate that the present volume of solid waste being brought into New Jersey for disposal from the City of Philadelphia is approximately 10,000 tons a week.

3. The figures available to the Department indicate that the volume of solid waste being brought into New Jersey for disposal from New York is significantly in excess of 10,000 tons a week. The Hackensack Meadowlands Development Commission has found, by actual count, that 10,000 tons a week from New York were being disposed of within the Hackensack Meadowlands District alone prior to the initiation of a ban on out-of-state dumping in that area. Much of the garbage previously disposed of in the Hackensack Meadowlands District is now being disposed of elsewhere in New Jersey.

4. Proposed rule N. J. A. C. 7:26-1.8.1 and 1.8.2 have been superseded by L. 1973, c. 363 and will not be adopted by the Department of Environmental Protection. N. J. A. C. 7:1-4 was adopted by the Department as an

emergency measure pursuant to L. 1973, c. 363 and the emergency procedure contained in the Administrative Procedure Act.

5. The ban on the disposal of out-of-state waste within New Jersey will increase State-wide landfill life by approximately 8 percent. In specific areas, or with respect to specific landfills, the ban substantially increased the capacity available for disposal of wastes, in some instances as much as 50 to 100 percent. In Middlesex County an actual survey made by the Department indicated that the ban would extend landfill life in that county by 20 percent.

6. It is extremely difficult to estimate accurately existing landfill capacity, but the Department's best estimate is that existing capacity in north Jersey is about 3 years, and in south Jersey as much as 10 years.

7. One of the difficulties in estimating total State-wide or regional landfill capacity is that many landfills in the State are located in environmentally sensitive areas such as floodplains, wetlands, or on State-owned public trust tidelands, and their operation may soon be limited or discontinued for environmental reasons. Such discontinuance will obviously decrease even further the availability of landfill sites for disposal of New Jersey wastes.

8. The cost of removing garbage from New Jersey landfills and transporting it back to the state of origin is conservatively estimated to be about $30.00 a ton, and it is probably much more. The Department is aware of a recent estimate of the cost to remove garbage from a north Jersey landfill. That estimate is $35.00 a ton.

9. The facts set forth in the Basis and Background document promulgated with the Department's proposed revision of solid waste management regulations are, upon information and belief, true.

BERNHARDT V. LIND.
Bernhardt V. Lind.

Sworn to and subscribed before me this 30th day of January, 1974.

THERESA A. CRAMER
Theresa A. Cramer
Notary Public of N. J.
My Commission Expires Sept. 12, 1976

BASIS AND BACKGROUND FOR THE PROPOSED RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT.

I. *General.*

In May of 1970, Governor Cahill signed into law the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 et seq., setting forth the statutory authority for the statewide control and supervision of solid waste collection, disposal and utilization. The New Jersey Department of Environmental Protection, through its Bureau of Solid Waste Management, implements those solid waste regulations. The Bureau's objectives are to minimize environmental damage resulting from the management of solid wastes, and to maximize the conservation of our resources through resource recovery.

Initially, the Department of Environmental Protection was faced with a system of solid waste collection and disposal which consisted of approximately 400 known disposal sites and thousands of collectors and haulers. The disposal sites, almost all of them landfills, were operating with the minimum of controls. Less than 10 percent could reasonably be considered sanitary landfills. On July 1, 1970, Chapter VIII of the New Jersey State Sanitary Code (Refuse Disposal) was revised to require the registration of all solid waste disposal operations and the submission of engineering designs by all landfills to the Department for review.

Implementation of Chapter VIII improved the land disposal operations, as well as provided the State with new statistical data concerning the impact of solid waste collection and disposal. For example, open burning of wastes as a method of disposal, and the depositing of solid wastes directly into our surface waters has become a rare occur-

rence. However, rapidly increasing generation of solid waste, the growing concern for the depletion of our land resources, and increasingly sophisticated technology in solid waste management necessitates the replacement of Chapter VIII with more comprehensive rules and regulations.

Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly "sanitary" involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same "natural" gas used in cooking and heating.

The technical and environmental problems related to solid waste management make clear the need for sound solid waste planning, and for the implementation of an orderly statewide plan for the collection, utilization, and disposal of our wastes. In 1970 the Department published the *New Jersey Solid Waste Management Plan,* calling for the establishment of regional solid waste collection and disposal systems. The regional concept is still valid and the need for its implementation becomes more evident daily. The Solid Waste Management Act (1970) mandates a registration priority for collection and disposal operations which conform with State and regional plans. The Bureau of Solid Waste Management constantly finds itself in need for valid sources of uniform data describing the current state of solid waste collection disposal in New Jersey.

At the cornerstone of planning for, and implementing, regional systems is solid waste collection. While the collection and haulage of our solid waste accounts for 75 to 85 percent of the total collection/disposal costs, the Department of Environmental Protection currently has no standards governing this vital aspect of solid waste management. Past studies indicate that our current systems are anything but orderly and efficient. Frequently, two, and sometimes three collection vehicles travel the same streets collecting refuse and those same collection vehicles often travel long distances to disposal sites even though they are designed for collection, and not for long distance haulage.

The County and Municipal Government Study Commission has clearly defined what is commonly called New Jersey's solid waste crisis. The Commission's report, *Solid Waste: A Coordinated Approach,* (September, 1972) indicates that the 9,880 acres of land then available for landfill are being used at the rate of 783 acres per year. Over 40,000 tons of solid waste are buried in New Jersey each day, and this figure is increasing at an alarming rate.

II. *Sanitary Landfill in New Jersey.*

There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered "marginal." Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.

Most of the requirements for the operation of sanitary landfills which were contained in Chapter VIII have been duplicated in the proposed regulations. A number of requirements, however, have been strengthened or reworded to reflect the original purposes of Chapter VIII. A true sanitary landfill, for instance, requires daily or more frequent soil cover. Cover material controls the emergence of flies from the fill, discourages rodent burrowing and reduces the attraction of the waste to birds. In addition, soil cover acts as a fire break and helps prevent the blowing of papers and other lightweight materials. Chapter VIII currently permits a small area on the landfill to remain uncovered for as long as three days for convenience in facilitating truck movement. It is felt that the benefits of daily cover far outweigh the relatively rare instances in which cover may interfere with truck movement. For that reason, the proposed regulations require all solid waste to be covered on at least a daily basis (see 7:26-2.5.13).

Still another cover problem which may arise involves the sanitary landfill operation which is dependent upon an outside source, or upon one particular piece of machinery, for its cover. The proposed regulations require the stockpiling of at least a 10-day supply of cover material near the active fill area (7:26-2.5.27) to ensure a source of cover in the event cover becomes unavailable for a short period of time, and to allow time for alternate arrangements to be made if necessary.

Providing cover material at a sanitary landfill on a daily or more frequent basis also minimizes odor problems at the site. While the existing Chapter VIII of the New Jersey State Sanitary Code requires the control of odors when previously deposited solid waste must be excavated, no provision was made for odor problems at active operations. The proposed regulations include an odor control

standard for active sanitary landfills (7:26-2.5.8) that is consistent with existing Department regulations dealing with the prohibition of air pollution (N. J. A. C. 7:27-5.1 et seq.).

The provisions of Chapter VIII governing the termination of sanitary landfills have also been expanded in recognition of the problems sometimes encountered at completed landfills which are not properly maintained. The proposed regulations require the continued maintenance of discontinued landfills by the property owner of record and, in addition, require the filing of detailed information concerning the landfill with the County Hall of Records in order that prospective landowners be made aware of the site's previous use as a sanitary landfill.

In addition, the proposed regulations would permit only those vehicles registered in accordance with the subchapter governing collection to deposit their wastes at the active operating area of the fill (7:26-2.5.19). Unregistered vehicles (such as family passenger automobiles) would be accommodated at containers located away from the active operation (7:26-2.5.20). The active operating area of a sanitary landfill accommodates heavy operating equipment, and this requirement is proposed for safety reasons.

Leachate.

Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequency likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations in the groundwater level, tidal in-

fluences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill "sponge."

Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

Characteristics of the Leachate From a Bin Study on Municipal Refuse

Constituents	*Initial sample*	*2 months following initial dosing*	*1 year and 2 months following initial dosing*
pH	6.55	NR	7.18
Total hardness (as $CaCO_3$) *	890	7,250	695
Alkalinity (as $CaCO_3$)	730	6,680	2,080
Calcium	240	2,190	135
Magnesium	64	340	105
Sodium	85	1,470	530
Potassium	28	1,115	520
Total iron	6.5	270	40
Ferrous iron	NR	68	4.1
Chloride	96	1,810	755

Constituents	*Initial sample*	*2 months following initial dosing*	*1 year and 2 months following initial dosing*
Sulfate	84	560	54
Phosphate	0.30	9.6	5.6
Organic nitrogen	2.4	320	22
Ammonia nitrogen	0.22	790	175
BOD	NR	33,100	125

* Measurements in mg/1.

(State of California, Report on the Investigation of Leaching of a Sanitary Landfill, State Water Pollution Control Board, Publ. No. 10, 1954.)

While examples of leaching sanitary landfills have been studied and documented for any years, only recently have researchers begun to study leachate generation in detail. As recently as 1972, the U. S. Environmental Protection Agency, in its report entitled "Sanitary Landfill Design and Operation," stated the following:

> "Some investigators believe that even in a sanitary landfill, leachate production is inevitable and that some leachate will eventually enter surface water or groundwater. This has not been proven but neither has the opposite view. The present philosophy held by the Office of Solid Waste Management Programs, most State solid waste control agencies, and many experts in the field is that through sound engineering and design, leachate production and movement may be prevented or minimized to the extent that it will not create a water pollution problem."

One particularly disconcerting feature of leachate production is the time delay created by the absorptive char-

acter of the wastes. Frequently, landfills do not begin leaching until some time after the fill has been completed and the waste has reached its saturation level. Climatic conditions in New Jersey are favorable to leachate production and, unless extreme measures are taken to prevent any liquid from infiltrating the waste, leachate will be produced in New Jersey's landfills. The problem then becomes one of preventing the pollution of our ground and surface waters by the leachate.

Water pollution from sanitary landfills is determined by a number of factors, including the site hydrology, geology, topography, method of operation, the type of wastes received for disposal, and other physical and chemical factors which vary from fill to fill. Clearly, then, the potential for polluting our ground and surface water resources should be a strong factor in the selection of a sanitary landfill site, and in its design and method of operation.

The proposed regulations include more detailed requirements for the preparation of sanitary landfill designs than did Chapter VIII of the New Jersey State Sanitary Code (see 7:26-2.12). The information supplied in those designs should be sufficient for the Department of Environmental Protection to assess the potential of a proposed sanitary landfill to pollute the ground or surface waters. The Solid Waste Management Act (1970), in describing the conditions under which the Department registers solid waste operations (N. J. S. A. 13:1E-5) states:

> "No registration shall be approved by the Department when in the opinion of the Department such solid waste collection or disposal system or operation will not meet the standards or criteria set forth in regulations as may be promulgated under authority of this Act."

In addition, the proposed regulations permit the Department of Environmental Protection to require the installation of observation wells at sanitary landfills to monitor the groundwater quality, and the regulations further require the correction of water-polluting conditions when that monitoring discloses contamination (7:26-2.5.4 and 7:26-2.5.22).

Gas Control.

Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called "aerobic." The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decomposition almost half the gas present is methane. Methane is the "natural gas" commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is no oxygen present, it does not pose an explosive threat in the fill itself.

Methane is, however, much lighter than air and, therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

The proposed regulations require gas control measures at all sanitary landfills (see 7:26-2.5.21) and the design of gas vents has been added to the sanitary landfill design requirements (7:26-2.12.2).

Hazardous Wastes.

New Jersey leads the nation in chemical industries. While chemical and hazardous wastes represent only a small percentage of all the wastes disposed of in New Jersey, improper handling of those wastes can present enormous health and environmental dangers. Regulations contained within the existing Chapter VIII of the N. J. State Sanitary Code merely require the proper labeling and transportation of hazardous and chemical wastes in accordance with existing State and Federal laws governing their transportation.

The proposed Rules governing the disposal of pesticides, hazardous, chemical, and infectious wastes, as well as bulk liquids and semi-liquids (7:26-2.6.4) require both the waste generator and the disposal facility operator to provide to the Bureau of Solid Waste Management complete information on the wastes handled. Determining the proper method of treatment or disposal would be a joint responsibility of the generator, facility operator, and the Bureau.

The introduction of bulk liquids into a landfill can greatly affect the generation of leachate within the fill, and leaching fom fills which have accepted hazardous wastes can have a particularly devastating effect on the quality of our water resources. For these reasons, the proposed regulations would require any sanitary landfill which accepts such wastes to establish and mantain water monitoring facilities, and to undertake immediate corrective measures should the monitoring disclose contamination.

Additionally, the proposed regulations would ban the disposal of hazardous wastes and bulk liquids at conventional sanitary landfills after March 15, 1975. This, it is felt, is sufficient lead-time for the construction of recovery, treatment and disposal facilities with sufficient safeguards to properly handle hazardous and bulk-liquid wastes.

Airport Restriction Zones

The Federal Aviation Administration, along with numerous state and other federal agencies, has become increasingly concerned with the attraction of birds to sanitary landfills located near airports. The ingestion of birds by jet aircraft can be especially dangerous, and several such incidents have been attributed to the proximity of solid waste disposal operations to airports. For this reason, the proposed regulations would ban the initiation of new disposal facilities within a 2⅛ mile "restricted zone" of certain airports in or near New Jersey. In addition, existing disposal facilities within the restricted zone would be required to implement effective bird-control measures. A radius of 2⅛ miles is sufficient for most jet aircraft to achieve an altitude safe from birds attracted to landfills.

III. *Definitions*

Problems encountered in the application and enforcement of Chapter VIII have made it clear that a uniform set of definitions is needed. The proposed regulations include a list of 77 definitions of terms used throughout those regulations.

IV. *Out-of-State Waste*

In 1971, at least 1⅛ million tons of solid waste generated outside of New Jersey were buried within this

State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously

high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

Solid Waste Planning

In enacting the Solid Waste Management Act (1970), the legislature declared ". . . that the current solid waste crisis should be resolved not only by the enforcement of more stringent and realistic regulations upon the solid waste industry, but also through the development and formulation of State-wide, regional, county, and inter-county plans for solid waste management and guidelines to implement the plans." In fact, that statute, in requiring the registration of solid waste collection and disposal operations, requires the Department of Environmental Protection to give "due consideration" to the development

of existing or "reasonably contemplated" regional operations. The proposed regulations provide a registration priority for new collection and disposal operations which conform to existing regional plans for solid waste management (N. J. A. C. 7:26-2.2.3 and -3.2.3).

The Department of Environmental Protection published the *New Jersey State Solid Waste Management Plan* in 1970. That plan, like the Solid Waste Management Act (1970), stresses the need for regionalization in solid waste collection and disposal. The publication of the state plan did not, however, represent the end of solid waste planning in New Jersey. The Department, as well as a number of counties and regional authorities, have been continually and actively involved in solid waste planning. The planning process, however, requires accurate and up-to-date uniform data on existing solid waste generation, transportation and disposal. In order to facilitate the Department's planning activities as well as to enable the Department to provide acceptable data for use by regional planning agencies, the proposed regulations require solid waste operations to keep records of the wastes handled and to make reports of those records to the Department (7:26-2.5.26, -2.6.4.1, and -3.10). In addition, solid waste disposal facilities would be required to periodically update the engineering designs submitted to the Department (7:26-2.2.1) and major solid waste collection systems would be required to submit collection system designs describing their operations (7:26-3.4 and 3.11).

Additionally, the proposed regulations would require the solid waste contents of collection vehicles to be determined by weight, either through the provision of scales at the disposal facility or through the use of public scales. Currently, the most common system of record keeping and

filling on the part of solid waste disposal operations is based upon the volumetric capacity of the vehicles being admitted for unloading. These records require solid waste planners to estimate waste densities (a highly variable parameter) and ignore the question of whether or not the vehicles are actually filled to capacity when they arrive at the disposal facility.

The provision of scales at solid waste facilities produces other benefits in addition to providing uniform planning data. Billing by weight, instead of by vehicle capacity, is a more equitable practice, and would assist the New Jersey Board of Public Utilities Commissioners in establishing rates. Furthermore, communities which engage in segregation and recycling activities, and collectors who provide resource recovery service, are more likely to derive a savings in their disposal costs if those costs are based on weight rather than the size of the collection vehicle.

Incinerators, Transfer Stations, and other Solid Waste Facilities.

The Bureau of Solid Waste Management does not currently administer standards or regulations governing solid waste facilities other than sanitary landfills. The proposed regulations include operational requirements and design standards for incinerators, transfer stations, processing facilities, reclamation centers and recycling facilities (7:26-2.11 and -2.12). The regulations proposed for those facilities are consistent with the minimum requirements for sanitary landfills. Controls over litter, dust, fire and vectors are similar to those governing landfills and are already contained within Chapter VIII of the New Jersey State Sanitary Code. In addition, requirements for the storage of putrescible materials, the handling of hazardous

wastes, odor control, the weighing of solid wastes and the maintenance of records are consistent with those proposed for landfill operations.

As is already the practice with sanitary landfills, the requirement for an engineering design for these facilities is intended to provide information to the Department of Environmental Protection to determine whether the proposed facility will meet Departmental standards. The Department is required to deny registration to any facility which, in its opinion, will not meet the standards or criteria set forth in its solid waste regulations.

Collection and Haulage.

While the Solid Waste Management Act (1970) empowered the Department of Environmental Protection to promulgate regulations governing the collection as well as the disposal of solid wastes, the Bureau of Solid Waste Management does not yet administer such regulations. The proposed regulations include a subchapter establishing standards for collection and/or haulage operations which are presented in a format similar to the regulations governing disposal facilities.

The proposed regulations establish the specific standards and procedures for the registration of collection operations. The registration of collection systems is a requirement of the Solid Waste Management Act (1970). The haulage of family refuse in family passenger automobiles would be exempt from the requirements of the collection subchapter.

Collection systems operated by governmental agencies, as well as those whose service is performed under contract to government or is authorized by a franchise, would be required to submit a collection system design to the Bureau of Solid Waste Management for review

(7:26-3.4 and -3.11). The system design would detail the routes, service stops, personnel and equipment involved in the collection operation, and would aid the Department in determining the ability of a proposed operation to meet operating standards. The collection system design would provide valuable information for use in state and regional solid waste planning.

The proposed operating standards for collection and haulage operations are already widely practiced by both municipal and private collection operations. Failure to provide proper collection services can result in unhealthy and unsanitary conditions at the place where solid waste is generated or stored. For this reason, the proposed regulations would require service routes to be of reasonable length, and would require the proper maintenance of collection vehicles to ensure timely collection services. In addition, the regulations require specific measures to be taken to minimize spillage or littering associated with the collection or haulage of wastes.

Fees.

In 1971 the Solid Waste Management Act (1970) was amended (Chapter 461, P. L. 1971) to permit the Department of Environmental Protection to adopt a fee schedule and to charge fees for any of the services it performs. The proposed regulations include a schedule of fees for registration of solid waste operations and for the review of engineering and collection system designs. The fee schedule is commensurate with the cost of the service performed by the Department.

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ADMINISTRATIVE ORDER NUMBER FORTY.

(Adoption of Emergency Rule.)

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
RICHARD J. SULLIVAN, COMMISSIONER
TRENTON

WHEREAS, Governor T. Cahill, on January 2, 1974, did sign into law Chapter 363 of the Public Laws of 1973, an Act prohibiting the importation into New Jersey of solid and liquid wastes generated outside the State, effective February 1, 1974; and

WHEREAS, that Act permits the Commissioner of the Department of Environmental Protection to promulgate regulations permitting and regulating the treatment and disposal of out of state wastes upon determining that such action can be permitted without endangering the public health, safety and welfare; and

WHEREAS, the President of the United States and Governor William T. Cahill have recognized and declared that a critical shortage of fuels exists throughout New Jersey and the Nation; and

WHEREAS, there is substantial evidence that the manufacture of reusable materials from recycled solid waste consumes less energy than the manufacture of those same materials from virgin materials; and

WHEREAS, viable processes exist for the production of useful and necessary energy and energy producing fuels from municipal solid waste; and

WHEREAS, the recycling and recovery of secondary materials from solid waste conserve and protect many valuable and diminishing natural resources; and

WHEREAS, New Jersey is one of the nation's leading producers of chemicals and petrochemicals and, therefore, produces substantial quantities of diverse hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes; and

WHEREAS, in order to preserve and protect the quality of New Jersey's environment, the Department of Environmental Protection has proposed rules which would prohibit the disposal of such hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes at conventional sanitary landfills within the State; and

WHEREAS, the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes frequently requires the use of elaborate processes and equipment; and

WHEREAS, it is apparent that the economic survival of solid waste facilities utilizing such elaborate processes and equipment for the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes generated within the State is dependent upon the acceptance of those wastes generated or collected outside the territorial limits of this State; and

WHEREAS, the imminent ban upon the importation into this State of wastes intended for resource recovery and recycling facilities, and of those hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes intended for treatment, processing or recovery facilities presents both an immediate and long-term peril to public health, safety and welfare,

NOW THEREFORE, under the powers and duties conferred upon me by the New Jersey Administrative Procedure Act, N. J. S. A. 52:14B-4 (c) and N. J. A. C. 15:15-

4.18 et seq. which empowers the Commissioner of the Department of Environmental Protection to adopt, amend or repeal an administrative rule whenever the Commissioner determines that an imminent peril to public health, safety and welfare exists, I do hereby adopt the following rules:

N. J. A. C. 7:1-4 IMPORTATION OF SOLID AND LIQUID WASTE FROM OUTSIDE NEW JERSEY.

N. J. A. C. 7:1-4.1 *Definitions.*

"Bulk Liquid" or "Bulk Semi-Liquid" means liquid or semi-liquid in the quantity of fifty-five (55) gallons or more.

"Chemical Waste" means discarded material resulting from any manufacturing process or other procedure which is or can become chemically active.

"Department" means the Department of Environmental Protection .

"Hazardous Waste" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms, because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause detrimental cumulative effects. They shall include waste materials that are (1) toxic or poisonous; (2) corrosive; (3) irritating or sensitizing; (4) radioactive; (5) biologically infectious; (6) explosive; (7) flammable; and present a significant hazard to human health and/or the environment. They include, but are not limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 91-596) and those listed

in Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

"Liquid Waste" means any waste which exists in the liquid state at standard conditions (70 F and 29.92 in Hg.).

"Pesticide" means any substance or mixture of substances labeled, designed, intended for or capable of use in preventing, destroying, repelling, sterilizing or mitigating any insects, rodents, nematodes, predatory animals, fungi, weeds and other forms of plant or animal life or viruses, except viruses on or in living man or other animals. The term "pesticide" shall also include any substance or mixture of substances labeled, designed or intended for use as a defoliant, desicant or plant regulator.

"Recycling or Reclamation Facility" means any place, equipment, or plant designed and operated to collect, store, or process and to redistribute separated materials so as to return the material to the raw materials market.

"Resource Recovery Facility" means any place, equipment, or plant designed and operated to separate or process municipal solid waste into usable secondary materials, including fuel and heat.

"Secondary Material" means previously used raw material.

"Semi-Liquid" means solid matter in a liquid media (e.g., a slurry).

"Solid Waste" means garbage refuse, sludge, and other discarded solid materials resulting from industrial, commercial, and agriculture operations and from community activities, and all other waste materials including liquids disposed of incident thereto except solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare, and feed such wastes to swine on their own farms.

N. J. A. C. 7:1-4.2 *Out-Of-State Waste.*

No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:

(a) Garbage to be fed to swine in the State of New Jersey;

(b) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste and that is intended for a recycling or reclamation facility;

(c) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70% of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

(d) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

N. J. A. C. 7:1-4.3 *Effective Date.*

These rules shall take effect on February 1, 1974.

THE FOREGOING IS HEREBY ADOPTED AND EFFECTIVE THIS ——— DAY OF JANUARY, 1974.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: RICHARD J. SULLIVAN
Richard J. Sullivan
Commissioner

ANSWER TO VERIFIED COMPLAINT.

———

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc. et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ANSWER

Defendants, by way of answer to the complaint in the above captioned matter, say:

COUNT 1.

1. The allegations contained in Paragraphs 1 through 6 of the First Count of the Complaint are admitted.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the First Count of the Complaint.

3. The Solid Waste Management Act referred to in Paragraph 8 of the First Count of the Complaint speaks for itself.

4. The allegations contained in Paragraph 9 of the First Count of the Complaint are admitted.

5. With respect to the allegations contained in Paragraphs 10 and 11 of the First Count of the Complaint, the Waste Control Act (L. 1973, c. 39) speaks for itself.

6. Defendants admit the allegations contained in Paragraphs 12, 13 and 14 of the First Count of the Complaint; however, said regulations (N. J. A. C. 7:26-1.8.1 and 1.8.2) have been superseded by L. 1973, c. 363, and said regulations will not be adopted by the Department.

7. The Solid Waste Utility Control Act referred to in Paragraph 15 of the First Count of the Complaint speaks for itself.

8. The allegations contained in Paragraph 16 of the First Count of the Complaint are denied.

9. The allegations contained in Paragraph 17 of the First Count of the Complaint are admitted.

10. The allegations contained in Paragraph 18 of the First Count of the Complaint are denied.

11. The allegations contained in Paragraph 19 of the First Count of the Complaint are denied.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the First Count of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the First Count of the Complaint.

14. The allegations contained in Paragraph 22 of the First Count of the Complaint are denied.

COUNT 2.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Pragraph 2 of the Second Count of the Complaint are denied.

COUNT 3.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Third Count of the Complaint are denied.

COUNT 4.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourth Count of the Complaint are denied.

COUNT 5.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifth Count of the Complaint are denied.

COUNT 6.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixth Count of the Complaint are denied.

COUNT 7.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventh Count of the Complaint are denied.

COUNT 8.

1. Defendants repeat their answers to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraphs 2 through 12 of the Eighth Count of the Complaint are admitted, except that the various laws of the State of New Jersey referred to in said allegations speak for themselves.

3. Defendants admit that the preservation of additional landfill acres for solid waste generated in New Jersey was one of the reasons for the enactment of a ban on the disposal in New Jersey of waste originating outside the State.

4. The allegations contained in Paragraph 14 of the Eighth Count of the Complaint are admitted.

5. The allegations contained in Paragraph 15 of the Eighth Count of the Complaint are denied.

6. The laws of the United States, specifically 42 U. S. C., § 3254, speak for themselves.

7. The allegations contained in Paragraph 17 of the Eighth Count of the Complaint are denied.

8. The allegations contained in Paragraph 18 of the Eighth Count of the Complaint are denied.

9. Defendants repeat their answers to the allegations contained in Paragraphs 20 through 22 of the First Count of the Complaint and incorporate same herein by reference.

COUNT 9.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Ninth Count of the Complaint are denied.

COUNT 10.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Tenth Count of the Complaint are denied.

COUNT 11.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eleventh Count of the Complaint are denied.

COUNT 12.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Twelfth Count of the Complaint are denied.

COUNT 13.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Thirteenth Count of the Complaint are denied.

COUNT 14.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourteenth Count of the Complaint are denied.

COUNT 15.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifteenth Count of the Complaint are denied.

COUNT 16.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixteenth Count of the Complaint are denied.

COUNT 17.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventeenth Count of the Complaint are denied.

COUNT 18.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eighteenth Count of the Complaint are denied.

COUNT 19.

1. N. J. S. A. 13:1I-4(a) speaks for itself.

2. The allegations contained in Paragraph 2 of the Nineteenth Count of the Complaint are denied.

FIRST SEPARATE DEFENSE.

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE.

To the extent that the complaint constitutes a challenge to the administrative regulations adopted by the Department of Environmental Protection, the Superior Court, Law Division, lacks jurisdiction over the subject matter thereof.

THIRD SEPARATE DEFENSE.

The enactment of L. 1973, c. 363 has superseded the proposed regulations referred to in the complaint as

N. J. A. C. 7:26-1.8.1 and 1.8.2. The Department has indicated its intent to not adopt those proposed regulations. Thus the allegations with respect to those regulations are moot.

FOURTH SEPARATE DEFENSE.

Plaintiffs have failed to exhaust their administrative remedies.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

I hereby certify that the within pleading has been served within the time prescribed by Rule 4:6.

JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

ORDER GRANTING INTERLOCUTORY INJUNCTION.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
Docket No. L-15068-73 P. W.
CIVIL ACTION

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Herbert F. Moore, Esq., attorneys for plaintiffs, and in the presence of Joseph M. Clayton, Jr., Deputy Attorney General of the State of New Jersey, attorney for defendants, and the Court having considered the complaint and affidavits attached thereto and the answer filed on behalf of the defendants, and having heard the arguments of the respective counsel, and being satisfied that the plaintiffs are entitled to an order restraining defendants as demanded.

And it appearing that the Order to Show Cause made on the 25th day of January, 1974 has been duly served as therein directed,

It is on this 1st day of Febr., 1974,

ORDERED, that the State of New Jersey shall desist and refrain from enforcing the provisions of P. L. 1973, c. 363;

IT IS FURTHER ORDERED, that Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from enforcing N. J. A. C. 7:1-4;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from adopting any rule or administrative order, of any nature or description, which would prohibit the treatment or disposal in New Jersey of solid waste collected or originating in another state, or which would prohibit transportation of such waste into this state for disposal purposes;

IT IS FURTHER ORDERED, that the restraints contained herein shall apply to the aforesaid defendants and their agents, employees, servants and attorneys until the further order of this Court.

/s/ GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

EXCERPTS FROM PEREIRA DEPOSITION.
(March 13, 1974.)

[64]

particular site Joe Miller has all the ground water data and he is in the ground water section.

When it comes to a ground water, the formation, the location and so on and so forth, they turn to me.

Then, of course, Dr. Kemball Widmer, who is our Chief, as in all offices where the brass is concerned, he would have the ultimate say.

Mr. Meisel: That is all I have.

• • •

LINO F. PEREIRA, sworn.

DIRECT EXAMINATION.

By Mr. Meisel:

Q. Mr. Pereira, I am going to ask you a series of questions.

The purpose of the questions is to in no way trick you but simply to elicit answers to the questions that are asked.

If you do not understand a question at any time or if the question needs to be rephrased for you to understand it, please ask me and I will do so.

A. Right.

Q. Could you please state your place of employment.

A. I work for the New Jersey Department of Environmental Protection, the Bureau of Solid Waste Management

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in the Division of Environmental Quality.

Q. What is your position in that Bureau?

A. I am principal environmental engineer with that Bureau.

Q. How long have you served in that capacity?

A. For approximately 10 months.

Q. Were you employed by the State of New Jersey prior to that time?

A. Yes. I have been employed by the State and specifically the Bureau of Solid Waste Management since early June of 1970.

Q. In what capacity were you employed prior to being employed as principal engineer?

A. For the first year of my employment I was employed with the title of Chemical Engineer Trainee.

For the subsequent year I was employed as an Assistant Environmental Engineer.

For approximately 11 months thereafter I was employed as a senior environmental engineer and since that time I have held the title of Principal Environmental Engineer.

Q. Were you employed for any other concern prior to coming with the State?

A. Not on a full-time basis, that is, not other than summer work and part-time work while I was in college.

Q. When did you graduate from college?

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A. In 1970.

Q. With what degree?

A. Bachelor of Science in Chemical Engineering.

Q. Do you hold any license issued by the State of New Jersey?

A. Not any license, not as a licensed professional engineer although I am registered with the Board of Professional Engineers under Title 45 as an engineer in training, which is a prerequisite for obtaining a license as a professional engineer.

Q. I notice that you have obtained a BS in Chemical Engineering.

Did you have any specific course work concerning sanitary engineering?

A. None specifically concerning sanitary engineering although a number of the courses one is required to take for chemical engineering are also required by sanitary engineering.

Q. Are you familiar with Public Law 1973 Chapter 363 passed by the State of New Jersey, being an act to prohibit any person from bringing into this state any solid and liquid waste which originated or was collected outside the state and supplementing the Waste Control Act approved February 21, 1973?

A. Yes, I am.

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Q. Are the standards as proposed in the proposed rules of the Bureau of Solid Waste Management adequate to protect the public health, safety and welfare or the quality of the environment?

A. Only insofar as those standards are met by the operation.

Q. All right. So if they are met is your answer Yes?

A. My answer is Yes but it is qualified to the extent that sometimes it is not feasible or possible to meet

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the standards.

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[99]

Q. How does the Department of Environmental Protection compute the life expectancy of a particular landfill site?

A. The only method or the method that the department has used and does use in computing the life expectancy of a sanitary landfill site utilizes the information submitted with the engineering design, that information being the life expectancy of the site as calculated by the design engineer and the tonnage received at the site per week.

The calculation by the department assumes that the tonnage will remain constant and that the engineer calculated his life expectancy on that constant tonnage and the calculation involves taking the tons per week—well, I can probably stop here and say that for any particular site the life expectancy is given to us in the engineering design by the licensed professional engineer who provided it and it is assumed that he does so based on current tonnages or expected tonnages at the site.

Q. Let us suppose that it is a 200-acre site, that the site is uniform throughout and as a result there are no special problems, the entire site is useful, that 10,000 tons per week is brought to that site, that the site will be built up by 50 feet, that one is using the usual six inches of daily cover and 2 feet of final cover, what would

[100]

the anticipated life expectancy of that site be, utilizing the best compaction methods available in the state of the art?

A. We are speaking about a 200-acre site by 50 feet in depth, uniformly 50 feet across the entire thing?

Q. That is correct.

A. And you were asking for the maximum amount of solid waste that can be placed therein?

Q. I am asking for the anticipated life expectancy of the site.

A. Could you give me the rate at which tonnage is brought in again?

Q. 10,000 tons per week.

A. Are we pre-supposing here that the operator utilizes the space to the maximum by under existing standards creating each lift as high as is permitted under existing standards?

Q. Yes, we are.

A. Are you asking me to calculate it or do you want to know how we would calclulate it?

Q. I am asking you to calculate it.

A. My calculations bring this to over 12 years or 12.4 years in fact, assuming that one-fifth of the volume is consumed by soil cover.

Q. What is the expected or anticipated life

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expectancy of landfills presently existing in the State of New Jersey?

A. That is very difficult to calculate because of a number of factors.

Our best estimate is that the existing landfills in the state have no more than 10 years of life.

Q. Would the life expectancy of existing landfills be increased by using a variety of processing alternatives to reduce weight and/or volume of solid waste?

A. Yes, I believe so.

Q. Has there been any estimate as to how long that life expectancy would be extended by using such processing alternatives?

A. No, there hasn't been any estimate to my knowledge.

Q. Has there been any estimate as to the availability of additional acreage in the State of New Jersey for sanitary landfill purposes?

A. No estimate has been made but noting the establishment of new sanitary landfills, the rate of that establishment is low compared to the frequency with which landfills cease to exist in this state.

Q. Can new sanitary landfills be established in the State of New Jersey?

A. Yes, I believe they can be established.

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Q. You indicated earlier that certain kinds of land may be more suitable than other kinds of land for sanitary landfill purposes.

A. That's correct.

Q. Is there any estimate as to the number of acres of the most suitable land for sanitary landfill purposes which presently exists in the State of New Jersey?

A. I find that a very difficult question to answer because, first, it speaks to the relative suitability of one piece of land over another piece of land for the use of sanitary landfill.

If one defines one's standards stringently enough, I suppose it is possible to end up with very little square feet of land that is entirely suitable.

Q. Under existing standards in the State of New Jersey which could not be used for sanitary landfill purposes?

A. Yes.

Q. What kind of land could not be used?

A. Lands which are, for instance, protected in their natural state as are flood plains, wetlands, various tidal lands existent in the state as well as, of course, other restrictions such as local land use requirements so far as they apply to sanitary landfill sites.

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Q. I am not speaking to whatever local land use requirements there might be.

A. You are speaking only of environmental considerations?

Q. Approximately how many acres would you calculate there are involved in the kinds of land you suggested would be absolutely unsuitable or unusable for sanitary landfill purposes?

A. I don't know.

Q. Does it represent a substantial portion of the land of the State of New Jersey in terms of the total land area of the state or does it represent an insubstantial total land area taken the total land area of the state?

A. Again I don't know because I don't deal specifically with those lands.

I can only answer that in my experience with the review of designs and the approval of existing facilities in the state that a substantial portion of the existing facilities, sanitary landfills in the state does now or did consist of those lands.

Q. Who is responsible for working in those areas?

A. The Wetlands Act is administered specifically by the Wetlands Section in the Division of Marine Services in the Department of Environmental Protection.

The flood plain requirements are administered speci-

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Q. Is it the volume of solid waste which causes a threat?

A. Yes, in terms of its tonnage, the actual quantity of waste, the degree of threat is directly proportionate to the tonnage of waste disposed.

Q. If there was less tonnage would the threat or could the threat be diminished to a point where it would not pose a substantial or material threat?

A. I suppose it could but I could not possibly put my finger on the tonnage that would not pose a substantial or material threat.

It may only be one ton. I don't know.

Q. Can New Jersey dispose of all or a portion of its solid waste outside the State of New Jersey?

A. Can it do so?

Q. Yes.

Mr. First: You mean can the people of the state?

Mr. Meisel: Yes.

A. As far as I know under existing legislation it can be done. It is possible.

Q. Are there instances in which communities in New Jersey dispose of all or a portion of the solid or liquid waste originating in those municipalities outside of the State of New Jersey?

[113]

A. There have been instances in the past and even in the recent past, if one considers 1971 the recent past. I am not familiar with the communities or the quantities after 1971.

Q. Does the City of Phillipsburg dispose of substantially all its solid waste outside the State of New Jersey?

A. It did in the calendar year 1971 as far as I know.

Q. Are there sanitary landfill facilities outside of the State of New Jersey which accept solid waste which originates inside of the State of New Jersey?

A. I don't know if there are sanitary landfill facilities.

Our records merely indicate that in the Calendar year 1971 some wastes were exported from the state to disposal sites outside the state.

Q. Has the Department of Environmental Protection explored the question as to whether a greater percentage than now exists of solid waste originating in New Jersey can be disposed of outside the State of New Jersey?

A. You mean by that have we contemplated sending more out?

Q. No. I am asking if you have looked into alternatives, whether there are facilities to which you could

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send solid waste originating in New Jersey which exist outside the State of New Jersey.

A. I can think of no effort on our part to look into that at all.

Our planning for Solid Waste Management has assumed that New Jersey will bear the responsibility for its own wastes.

The planning has gone on accordingly.

Mr. Meisel: I think we can break for the day.

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MOTION FOR SUMMARY JUDGMENT.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

Docket No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al
Defendants

TO: WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

SIR:

Please take notice that the undersigned, attorneys for plaintiffs, will apply to the Superior Court of New Jersey, Mercer County Court House, Trenton, New Jersey on Friday, March 22, 1974 at 9:00 A. M. or as soon thereafter as counsel may be heard, for summary judgment in favor of plaintiffs only upon the issues of federal preemption and discrimination against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution; and plaintiffs will make further application for an order to set the date of hearing on the merits of the matter, if such hearing is necessary, on Monday, April 15,

1974, or upon such other day as may be ordered by the court and not on Monday, March 25, 1974 as presently scheduled.

On or before Monday, March 18, 1974, there will be served upon defendants the documents upon which plaintiffs will rely at the hearing on this motion.

JAMIESON, WALSH, MCCARDELL, MOORE
and PESKIN
A Professional Corporation

by: ARTHUR MEISEL
Arthur Meisel

Dated: March 14, 1974

CONSENT ORDER.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc., et al.
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al.
Defendants.

This matter having been opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, attorneys for plaintiffs, for an order permitting plaintiffs to set down a hearing date for a notice of motion upon short notice; and it appearing to the Court that trial in the within matter is presently scheduled for March 25, 1974;

And it further appearing that the within matter may be disposed of in whole or in part by motions for summary judgment;

And it further appearing that it would be materially inconvenient to conduct a trial on the within matter on March 25, 1974;

And it further appearing that William F. Hyland, Esquire, by Mark L. First, Esquire, Deputy Attorney General, attorney for defendants, has consented to the entry of the within order;

And good cause appearing,

It is on this 15th day of March, 1974,

ORDERED, that the plaintiffs' notice of motion for summary judgment and defendants' cross-motion for summary judgment be and the same hereby is set down for a hearing before this court on Friday, March 22, 1974 at 1:30 P.M. or such later time as counsel may be heard; and it is further

ORDERED, that plaintiffs serve a brief and such other documents upon which they will rely in connection with said motion, upon defendants and upon the court on or before Monday, March 18, 1974; and it is further

ORDERED, that defendants serve upon plaintiffs and upon the court, such brief and other documents upon which they will rely in connection with said motion, on or before the forenoon of Thursday, March 21, 1974; and it is further

ORDERED, that the trial on the merits of the within matter is rescheduled for Monday, April 15, 1974.

GEORGE Y. SCHOEN
George Y. Schoen, A. J. S. C.

I hereby consent to the entry and form of the within order.

MARK L. FIRST
Mark L. First
Deputy Attorney General
Attorney for Defendants

EXCERPTS FROM BRIEF SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.
(Pages 1 and 2.)

INTRODUCTORY STATEMENT.

The Constitution of the United States provides that Congress shall have the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." *U. S. Const.* Art. 1, Sec. 8, cl. 3.

There are four separate and distinct commerce clause issues presented by the within litigation:

1. Whether Congress has expressly or impliedly pre-empted the right of a state, in the exercise of its police power, from prohibiting a person from bringing into a state any solid or liquid waste which originated or was collected outside the territorial limits of the state;

2. Whether a state, in the exercise of its police power, can discriminate against interstate commerce;

3. Whether and to what extent a state, in the exercise of its police power, can burden interstate commerce; and,

4. Whether reasonable and undiscriminatory alternatives, adequate to conserve local interests, are available.

Issues numbered (1) and (2) are purely legal in nature and are ripe to be decided by the court on a motion for summary judgment. Issues numbered (3) and (4) require factual testimony, and therefore are not made part of the motion for summary judgment or discussed in this brief.

EXCERPTS FROM BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

(Pages 1, 17-18.)

[1]

PROCEDURAL STATEMENT.

This brief is submitted in support of defendants' motion for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment. The cross-motions for summary judgment are directed to two issues: (1) whether the power of the State of New Jersey to enact P. L. 1973, c. 363 has been pre-empted, and (2) if not, whether P. L. 1973, c. 363 discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution.

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[17]

It is thus evident that the court must consider *"all the relevant facts and circumstances."* At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.* The Supreme Court has stressed that:

> *". . . state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.* Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 U. S. 8, 87 L. ed. 578, 63 S. Ct. 420); Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594.

• • •

> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and *whether the relative weights of the state and national interests involved are such as to make inapplicable the rule. . .*" *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 770, 89 L. Ed. 1915, 1925, 65 S. Ct. 1515 (1944) (emphasis added).

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes [18] in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the affect on interstate commerce.

• • •

AFFIDAVIT OF DAVID J. DAMIANO.
(May 7, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc., et al.
Plaintiffs,

v.

STATE OF NEW JERSEY, etc., et al.
Defendants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

DAVID J. DAMIANO, of full age, being duly sworn according to law, upon his oath says:

1. I am the Commissioner of the Department of Streets of the City of Philadelphia, one of the above-named plaintiffs.

2. That as Commissioner I have the responsibility for the Sanitation of the City and the disposal of its solid waste material.

3. I have personal knowledge of the matters hereinafter referred to and make this affidavit in opposition to a notion made by the Defendants to stop the Judgment of this Court in the within matter.

4. I have previously given my affidavit on January 16, 1974 in which affidavit set forth facts that if P. L. 1973, c. 363 were enforced, the City of Philadelphia would suffer great, immediate and irreparable damage, in that the City of Philadelphia does not have other alternative facilities available for the disposal of the solid waste originating within its municipal confines, other than incinerators, the operation of which would violate existing Federal Air

Pollution Standards, and is dependent upon the utilization of those facilities located within the State of New Jersey at the present time.

5. That since the date of the last affidavit there has been virtually no change in the City's dependence upon the New Jersey facilities for disposal of its solid waste material other than placing out for bid a survey project for the disposal of solid waste material in a strip mining site in the Western portion of the State of Pennsylvania. This survey would be an initial step to determine the feasibility of the disposal of processed solid waste material at a point substantially distant from the City of Philadelphia utilizing railroad transportation. If the survey is successful, the program would require a period of time not less than six (6) years to make a site ready in compliance with existing Federal and State environmental laws.

6. If the motion for Stay of Judgment is granted and restraints are not continued in the Court, pending appeal, the City of Philadelphia will suffer great damage, in that solid waste will acccumulate within the said City and would become a serious hazard to the health, safety, and welfare of the people thereof and eventually to the people within the Delaware Valley area which consists of areas within the Commonwealth of Pennsylvania, the State of New Jersey and the State of Delaware. This problem presents an immediate hazard at all times, and is particularly compelling during the heat of the summer months.

DAVID J. DAMIANO
David J. Damiano

Sworn to and subscribed before me this 7 day of May, 1974.

JANET ALTHOUSE
Janet Althouse

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires February 5, 1977.

RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT.

N. J. A. C. 7:26-1 et seq.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
David J. Bardin, Commissioner

Effective July 1, 1974

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

ADOPTION OF RULE REVISION BUREAU OF SOLID WASTE MANAGEMENT

As Commissioner of the Department of Environmental Protection, in accordance with N. J. S. A. 13:1E-1 et seq., I have promulgated new Rules of the Bureau of Solid Waste Management (N. J. A. C. 7:26-1 et seq.). These rules replace the 1970 Rules known as N. J. A. C. 7:26-1 (formerly Chapter VIII—Refuse Disposal, a chapter of the New Jersey State Sanitary Code, adopted April 30, 1970 by the Public Health Council). The new rules have an effective date of July 1, 1974 and govern disposal, collection/haulage and fees.

Legal notice of the proposed regulations and the public hearing concerning them, as required by law, was given November 8, 1973. The public hearings were held on December 11, 1973, December 13, 1973, January 21, 1974, January 23, 1974, and January 25, 1974, during which eighty-five (85) organizations and private citizens testified.

In response to public testimony, 140 out of 335 subsections were altered. Most of the revisions consisted of rewording to clarify the intent of the regulations; some were made less restrictive because they were found to be more stringent than necessary. No rule was altered in such a way as to provide less protection to the public health, safety or welfare than provided by the Chapter VIII regulations. Richard D. Goodenough, Director of the Division of Environmental Quality solicited opinions from approximately 120 organizations, agencies and individuals (including all 85 who testified at the public hearings) on the draft revisions of May 15, 1974. Nineteen responses were received; four recommended adoption as revised, five recommended adoption with some minor changes, three recommended adoption with more stringent requirements, six recommended major (less restrictive) changes before adoption, and one was against the adoption of any new rules. Nine sub-sections of the May 15th draft have been reworded, three have been deleted and the definition of the word "putrescible" was added.

We do not now adopt the proposed sub-section requiring that, "no registration for a new facility shall be approved which would be in conflict with existing state, county or regional plans", pending further progress on regional solid waste planning. Language with respect to the concept of regionalization and applicability of these rules will be proposed at a later date.

In addition to the need for specific guidelines and criteria concerning regional plans, the thorough public scrutiny given the proposed rules has emphasized the need for additional chapters to be added to these rules. I expect, therefore, in the coming months, to propose new rules governing water sampling and analytical procedures,

pesticide disposal, hazardous waste disposal, the review of environmental assessment statements for solid waste facilities, and rules concerning the disposal of shredded wastes.

An analysis of the cost of the new regulation to New Jersey's taxpayers, prepared by the Solid Waste Industry Council of New Jersey (SWIC), projected an average increase of 200% in the cost of solid waste disposal. SWIC admitted in testimony to the Bureau of Solid Waste Management that their projected increase in cost of 200% was a result of comparing full compliance with the 1974 regulations with the cost of non-compliance with the 1970 regulations. In preparing their analysis, SWIC assumed that all sanitary landfills purchased their soil cover, would be required to install leachate collection and treatment systems and would have to install scales. A more realistic comparison of the differences between Chapter VIII and the new Rules which I have adopted discloses an expected increase in disposal costs of 18 cents per ton (5% rise) and an increase in collection costs of about 2 cents (1/10 of 1%). The cost of solid waste collection and disposal to the average family of three will rise approximately 20¾ cents per year (present average rate is $48 annually), with the adoption of these new Rules.

These new Rules will entail an increase of approximately $50,000 in State administrative expenses over the currently budgeted $296,361. The adoption of these rules is expected to generate some $300,000 in fees.

The far greater protection to the lands and waters of this State as a result of the new Rules of the Bureau of Solid Waste Management in my judgement, far out-weighs the small increase in cost which will be incurred.

I consider the promulgation of these rules as an important first step in developing responsible State leadership in the field of Solid Waste Management. Diligent enforcement of this regulation is necessary to protect the public health, safety, and welfare. However, regional solid waste management program development and implementation including resource recovery is the real answer to New Jersey's solid waste crisis. Development of strategies to establish such a system is a high priority for New Jersey.

DAVID J. BARDIN
David J. Bardin
Commissioner

Approved: 28 June 1974

Filed with Secretary of State: 28 June 1974

STATE OF NEW JERSEY

DEPARTMENT OF ENVIRONMENTAL PROTECTION

DAVID J. BARDIN, Commissioner
P. O. Box 1390
Trenton, N. J. 08625
609 - 292 - 2885

ADOPTION OF REVISION TO RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT

N. J. A. C. 7:26-1 et seq.
Docket No. DEP 021-75-02

David J. Bardin, Commissioner of the Department of Environmental Protection, pursuant to the authority of N. J. S. A. 13:1E-1 et seq. as amended, and N. J. S. A. 13:1D-1 et seq. hereby adopts revisions to Subchapter 7:26-4 of the Rules of the Bureau of Solid Waste Management concerning fees. The Department will hereafter propose and adopt additional revisions to the Rules of the Bureau of Solid Waste Management.

On March 6, 1975, the Department published notice of the proposed revisions to the Rules of the Bureau of Solid Waste Management in the New Jersey Register (7 N. J. R. 101(a), Docket No. DEP 021-75-02). In addition, notification was mailed to landfill operators, registered collectors/haulers, environmental commissions, health officers, municipal mayors and councils, watershed associations, organizations and private citizens.

In the Notice published in the New Jersey Register it was proposed to exempt those landfills operated in a municipality with a population of 10,000 or less and limited to residents hauling their own household refuse. At that time, it was estimated that 74 facilities would fall into this category. Upon re-examination, it was found that only in 6

or 7 communities do residents haul their own household refuse. The rules adopted here exempt from the inspection and regulation fee not only landfills in those communities where the residents haul their own refuse, but also landfills operated in communities with a population of 5,000 or less. In those communities having a population of 5,000 or less, handling only municipal type wastes, the Department is of the opinion that one inspection per year by Department personnel in conjunction with inspection reports by the town engineer would be adequate.

A public hearing was held on March 31, 1975 with the record remaining open for written comments thereto until April 7, 1975. Twenty-five written comments were received in addition to oral testimony presented at the hearing. The groups testifying included representatives of the New Jersey State Chamber of Commerce, the Chemical Manufacturers Association, the Solid Waste Industry Council (SWIC), watershed associations, environmental organizations, and private citizens. A list of those interested respondents who have contributed their thoughts is attached.

The present Rules of the Bureau of Solid Waste Management require a $500 annual fee for registration regardless of the size of the facility or type of waste accepted. There are no additional fees for inspection and regulation.

The rules as hereby adopted reduce the annual registration fee to $50 for all facilities. Inspection and regulation fees are on a sliding scale and are based on the size of the facility as well as the type of waste accepted.

The staff of the Department of Environmental Protection has reviewed all of the comments received. The Department realizes that additional review and study will be necessary prior to promulgation of revisions to the rules dealing with the definition and listing of hazardous waste, the siting and number of monitoring wells, test parameters and interpretation and the costs involved.

However, there is no reason to delay promulgation of the rules dealing with the fee schedule.

These rules will become effective immediately.

DAVID J. BARDIN
David J. Bardin
Commissioner

29 April 1975
Date

Oral Testimony @ Public Hearing–March 31, 1975

1) W. P. Anderson
for: State Chamber of Commerce and the New Jersey Chemical Industry Council of Environmental Commissions

2) Susanna Waterman
for: Sierra Club (NJ Chapter & The South Jersey Group)

3) R. K. Altreuter
for: Exxon Company USA

4) John Surmay
for: The City of Elizabeth

5) William P. Philibar
for: Rollins Environmental Services

6) Ian Walker
for: Stony Brook-Millstone Watershed Association

7) Theodore Schwartz
for: Solid Waste Industry Council of New Jersey

8) Dennis Fenn
Engineering Consultant for: Solid Waste Industry Council

9) David Nalven
for: NJ Manufacturers Association

10) Warren Gragory
for: National Solid Waste Management Association

11) Kenneth DiMuzio
for: Deptford Township Board of Health

12) Lief Sigmund
for: Scientific Chemical Processing Company

13) Betty Little
for: Passaic River Coalition

14) Wallace Coster
for: Nassau Inc.

15) Arthur Albohn
for: The Comline-Sanderson Engineering Corporation of Peapack

16) Peter Larson
for: Upper Raritan Water Association

17) Dr. Marvin Mahan
for: Scientific Inc.

18) Vincent Dotoli
for: John P. Fazzio Landfill Company & Southern Ocean Landfill

Written Testimony

1) Jerry Couvaras
for: Jerry's Cesspool and Septic Tank Service

2) Jan F. VanPeppen Ph.D.
private citizen

3) A. D. Grant
for: S. B. Pennick & Company

4) Lawrence E. Ward, Jr.
for: Garden State Septic Cleaners Association

5) Arthur R. Kobin
for: Browning-Ferris Industries

6) Ann Hunter
for: Solid Waste Advisory Council

7) Fred Hebeler
for: Solid Waste Advisory Council (Dept. of Health)

8) Richard O. Johnson
for: Solid Waste Advisory Council

9) Roger W. Johnson
for: Woodbridge Metropolitan Chamber of Commerce

10) J. H. Rook
for: American Cyanamid Company

11) P. A. Palmer
for: E. I. Du Pont de Nemours & Company

12) W. P. Anderson
for: Tenneco Chemicals

13) Watson B. Smith
for: City of Summit

14) Carlyle W. Crane
for: Plainfield Area Cartman's Association

15) Margaret Sprout
for: Township of Princeton

16) Mrs. Louis Bessire
for: Borough of Princeton

17) Denise E. Reid and H. Philip Minis
for: Princeton Township Environmental Commission

18) John W. Richard, Jr.
for: Atlantic Sanitation Service

19) Mrs. R. O. Rippere, 2nd
for: League of Women's Voters of Monmouth County

20) Joseph M. Smith
for: B. F. Goodrich Chemical Company

21) Gene Laningham
for: Browning-Ferris Industries, Inc.

22) Mary Owen
private citizen

23) Geraghty & Miller, Inc., Port Washington, NY

24) Rossnagel & Associates, Cherry Hill, NJ

25) Marvin Mahan
for: Scientific Inc.

DOCKET No. DEP-021-75-02

NOTICE OF ADOPTION OF AMENDMENTS TO N. J. A. C. 7:26-4
RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT
CONCERNING FEES

Pursuant to N. J. S. A. 13:1E-1 et seq. Commissioner David J. Bardin hereby adopts the following revision in the Rules of the Bureau of Solid Waste Management identified as N. J. A. C. 7:26-1 et seq. The provisions of N. J. A. C. 7:26-4 adopted June 28, 1974, and effective July 1, 1974, are hereby repealed. The following rules are effective as of

7:26-4 RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT CONCERNING FEES.

—4.1 *General*

—4.1.1 In accordance with N. J. S. A. 13:1E-18, there is hereby established a Fee Schedule. Said schedule shall apply to all sanitary landfill operations, incinerators, transfer stations, processing facilities, resource recovery facilities or any other methods of collection or disposal requiring registration with the Department.

—4.2 *Payment of Fees*

Fees shall be paid by certified check or money order and made payable to: Treasurer, State of New Jersey.

—4.3 *Fee Schedule for Solid Waste Facilities*

—4.3.1 Annual Registration Fee	$50
—4.3.2 Fee for Transfer of a Registration	50
—4.3.3 Inspection and Regulation Fee	

Solid Waste Facilities accepting	*Fee per quarter during which wastes are accepted*
Hazardous wastes, non-hazardous bulk liquids, non-hazardous semi-liquids and non-hazardous chemicals (in quantities greater than normally present in municipal refuse and excluding septic tank clean-out waste).	$500
40,000 tons or more of solid waste annually.	500
Between 20,000 and 39,999 tons of solid waste annually.	400
Between 10,000 and 19,999 tons of sold waste annually.	300
Between 6,000 and 9,999 tons of solid waste annually.	200
5,999 tons or less of solid waste annually.	100
Transfer stations and all facilities accepting septic tank clean-out waste only.	50
Facilities Qualifying under —4.8.	0

—4.4 Engineering Design Review (per design). This fee will entitle the registrant to submit or resubmit all information found deficient on the first submission until such time as the approval of the engineering design is granted or denied.

$500

—4.5 Reserved

—4.6 Reserved

—4.7 *Fee Schedule for Collection and Haulage*

—4.7.1 Annual registration, inspection, and regulation:

a. First vehicle	$30
b. Each addition vehicle on the same registration	10

—4.7.2 The Registration of a solid waste collection and/or haulage system is non-transferable.

—4.7.3 Fees filed after July 1 shall be as follows:

(a) if initially submitted on or after January 1, be 50% of the full year's registration fee, or

(b) if initially submitted on or after April 1, be 25% of the full year's registration.

Partial fees paid shall only cover the fee requirement until July 1, of the year in which they were paid.

—4.8 *Exemption from Fee Payment*

—4.8.1 Any solid waste facility is exempt from payment of annual registration, inspection, and regulation fees provided that:

The facility is operated solely for the purpose of composting leaf and other vegetative yard wastes; and

The operation of the facility does not require a Certificate of Public Convenience and Necessity issued by the Board of Public Utility Commissioners; and

The annual Updated Registration Statement form (N. J. B. S. W. M. —41) filed with the Department prior to May 1 of each calendar year, is accompanied by a certification, executed by the operator of the facility on forms supplied by the Department, that the facility qualifies under the conditions set forth above.

—4.8.2 A sanitary landfill or transfer station is exempt from payment of inspection and regulation fee (see 4.3.3) provided that:

The operation of the facility does not require a Certificate of Public Convenience and Necessity issued by the Board of Public Utility Commissioners; and

The facility is limited to municipal waste of the residents of the host municipality; and

The solid waste facility is operated in a municipality having a population, based upon the most recent United States decennial census, of 5,000 or less—or—the facility is limited to residents of the host municipality hauling their own household refuse; and

The annual Updated Registration Statement form (N. J. B. S. W. M. —41) filed with the Department prior to May 1 of each calendar year, is accompanied by a certification, executed by the operator of the facility on forms supplied by the Department, that the facility qualifies under the conditions set forth above.

—4.8.3 Fees are not required for any solid waste facility or vehicle whose registrant is an agency of the New Jersey State Government.

—4.8.4 Fees are not required for any solid waste facility whose registrant is the federal government and whose operation is conducted on federal lands. Specifically not exempt are federal vehicles transporting solid waste to a solid waste facility registered with the Department.

—4.8.5 Persons hauling only their own household refuse in vehicles bearing passenger license plates or persons hauling solid waste in vehicles registered with the New Jersey Division of Motor Vehicles as having a maximum gross weight of 5,000 pounds, need not pay a registration fee to the Department.

–4.9 *Time for Submission of Fees*

Fee	*Jul 1*	*Oct 1*	*Jan 1*	*Apr 1*	*Others*
Annual registration (–4.3.1)	X				
Transfer of registration (–4.3.2)					At time of submission of Updated Registration Statement
Inspection and Regulation (–4.3.3)	X	X	X	X	
Engineering Design Review (–4.4)					At time of submission
Collector/Hauler Registration (–4.7.1)	X				

The provisions of N. J. A. C. 7:26-4 adopted June 28, 1974, and effective July 1, 1974, are hereby repealed.

New Jersey Administrative Code

(N. J. A. C.)

7:26-1 General Provisions of the Rules of the Bureau of Solid Waste Management

7:26-2 Rules of the Bureau of Solid Waste Management Concerning Disposal

7:26-3 Rules of the Bureau of Solid Waste Management Concerning Collection and Haulage

7:26-4 Rules of the Bureau of Solid Waste Management Concerning Fees

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[1]

7:26-1 General Provisions of the Rules of the Bureau of Solid Waste Management

—1.1 Scope of Rules

Unless otherwise provided by rules or statute, the following shall constitute the rules of the Bureau of Solid Waste Management and shall govern registration, operation and maintenance of landfill operations in the State of New Jersey, and other methods of solid waste disposal as may be approved by the Department; registration, operation and maintenance of collection and haulage operations in the State of New Jersey and other methods of collection and haulage of solid wastes as may be approved by the Department; a fee schedule for engineering review, registration, and inspection of solid waste disposal and registration of collection, haulage, and disposal operations in the State of New Jersey. These rules shall not apply to:

—1.1.1 The purchase, sale, collection, transport or other handling of separated, recycled or secondary materials exclusively in connection with the processing, recycling or utilization of such materials for re-introduction into industry as raw materials for further processing or use, provided that such materials are free from putrescible matter and are not mixed with other solid or liquid waste as defined herein. Specifically Not exempted are solid waste resource recovery facilities designed or operated for the purpose of separating mixed solid waste into useful secondary materials (including fuel and usable energy).

—1.1.2 Container-pickup facilities as herein defined.

—1.1.3 Garbage to be fed to swine in the State of New Jersey.

—1.1.4 Recycling Centers where individuals or organizations may deposit separated materials such as newsprint, bottles, cans, etc., prior to transport to the secondary materials industry.

—1.1.5 The intra-plant transport, temporary storage or other handling of plant generated waste materials. Specifically Nor exempt are those materials to be, or which are, deposited on or in the lands of this state for periods exceeding six months, or which through transport, storage or other handling will cause pollution of the surface or ground waters of this state, or which may pose a substantial or material threat to the public health, safety or welfare.

—1.2 *Construction*

These rules shall be liberally construed to permit the Department and the Bureau of Solid Waste Management to discharge its statutory functions.

[2]

—1.3 *Practice Where Rules Do Not Govern*

The Commissioner may rescind, amend, or expand these rules from time to time, and such rules shall be filed with the Secretary of State as provided by law. In any matter concerning solid waste management that arises not governed by these rules, the Commissioner, the Director or the Bureau Chief shall exercise his discretion within the authority of N. J. S. A. 13:1E-1 et seq.

—1.4 *Definitions*

—1.4.1 *Approved Registration*

The registration of a solid waste disposal site, collector/hauler, or other solid waste facility issued by the Bureau of Solid Waste Management, Department of Environmental Protection, after review and approval of the Registration Statement.

—1.4.2 *Bulk Liquid or Bulk Semi-liquid*

Liquid or semi-liquid which is contained within, or is discharged from, any one vessel, tank or other container which has the capacity of twenty (20) gallons or more.

—1.4.3 *Bulky Waste*

Large items of solid waste which because of their size or weight requires handling other than normally used for municipal solid waste. Bulky waste includes but is not limited to such items as tree trunks, auto bodies, demolition or construction material, appliances, furniture, and drums.

—1.4.4 *Bureau*

The Bureau of Solid Waste Management in the Division.

—1.4.5 *Bureau Chief*

The Chief of the Bureau of Solid Waste Management or any person designated to act on the Chief's behalf.

—1.4.6 *Catch-basin*

A chamber or well, usually built at the curbline of a street, which admits surface water for discharge into a storm water drain.

—1.4.7 *Cell*

Compacted solid wastes that are enclosed by natural soil or cover material in a land disposal site.

[3]

—1.4.8 *Chemical Waste*

A material normally generated by or used in chemical, petrochemical, plastic, pharmaceutical, biochemical or

microbiological manufacturing processes, which has been selected for waste disposal and which is known to hydrolize, ionize or decompose, which is soluble, burns or oxidizes, or which may react with any of the waste materials which are introduced into the landfill, or which is bouyant on water, or which has a viscosity less than that of water or which produces a foul odor. Chemical waste may be either hazardous or non-hazardous.

—1.4.9 *Collection*

The act of picking up solid waste at its point of generation or storage and placing it in a vehicle.

—1.4.10 *Collection Vehicle*

A vehicle (usually a specially designed truck) used in collection.

—1.4.11 *Collector-Hauler*

A person engaged in the act of collection of solid waste and/or transporting such waste between solid waste facilities.

—1.4.12 *Commissioner*

The Commissioner of the Department of Environmental Protection or any other person designated to act on the Commissioner's behalf.

—1.4.13 *Container-Pickup Facility*

A site where one or more containers are located for temporary storage of solid waste at the point of waste generation while awaiting periodic removal to a registered solid waste facility. A container-pickup facility differs from a transfer station (q. v.).

—1.4.14 *Construction Waste*

Waste building material and refuse resulting from construction, remodeling, and repair operations on houses, commercial buildings, pavements, and other structures.

—1.4.15 *Cover Material*

Soil, earth, or other inso'able and non-degradable material approved by the Department which is used to cover compacted solid waste in a sanitary landfill for the purpose of rodent and vector control, to minimize moisture entering the fill, to provide a fire break, and in the case of final cover, to grow vegetation for erosion control. The depth or thickness of cover material is to be measured after compaction with at least one pass of a bulldozer or other suitable equipment having a gross weight in excess of 10,000 pounds.

[4]

—1.4.16 *Daily Cover*

Cover material that is a minimum of six (6) inches in depth.

—1.4.17 *Demolition Waste*

Waste generated from the razing of buildings, factories, and other man-made structures, including streets, roads, and fences.

—1.4.18 *Department*

The New Jersey Department of Environmental Protection.

—1.4.19 *Director*

The Director of the Division of Environmental Quality or any person designated to act on the Director's behalf.

—1.4.20 *Disposal*

The storage, treatment, utilization, processing, or final disposition of solid waste.

—1.4.21 *Disposal Facility*

A solid waste facility used for the disposal of solid waste.

—1.4.22 *Division*

The Division of Environmental Quality in the Department.

—1.4.23 *Dump*

A land site which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers.

—1.4.24 *Engineering Design*

Reports and drawings, including a narrative operating description, prepared by a New Jersey licensed Professional Engineer to describe a solid waste facility and its proposed operation.

[5]

—1.4.25 *Environmental Impact Statement*

A statement as to the probable impact of the proposed solid waste facility upon the air quality, water quality, water supply, hydrology, geology, soils, topography, vegetation wildlife, aquatic organisms, ecology, demographic conditions, land use, aesthetics, history and archeology; a listing of adverse environmental impacts which cannot be avoided; a description of the steps to be taken to minimize adverse environmental impacts during construction and operation both at the project site and in the surrounding region; a listing of alternatives to all or any part of the project with reasons for their acceptability or nonacceptability; and a reference list of pertinent published information relating to the project, the project site and the surrounding region.

—1.4.26 *Existing Solid Waste Facility*

That portion of an active solid waste facility which, as of the effective date of these regulations, possesses a valid approved registration from the Department.

—1.4.27 *Final Cover*

Cover material that is a minimum of twenty-four (24) inches in depth.

—1.4.28 *Free Moisture*

Liquid that drains freely by gravity from solid materials.

—1.4.29 *Generation*

The act or process of producing solid waste.

—1.4.30 *Generator*

The person who causes solid waste to be generated.

—1.4.31 *Ground Water*

That water below ground, the static pressure of which is equal to or greater than prevailing atmospheric pressure; that water present in the saturated zone of an aquifer.

—1.4.32 *Haulage Vehicle*

A vehicle used to transport solid waste between one solid waste facility and another. A transfer vehicle.

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—1.4.33 *Hazardous Waste*

Any waste or combination of waste which poses a present or potential threat to human health, living organisms or the environment. It shall include waste material that is

toxic, corrosive, irritating or sensitizing, radioactive, biologically infectious, explosive, or flammable. It includes but need not be limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 9-596) (OSHA) and those materials listed in the current Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

—1.4.34 *Impermeable Liner*

A layer of natural and/or man-made material of sufficient thickness, density, and composition so as to have a maximum permeability for water of 10^{-7} cm/sec at the maximum anticipated hydrostatic pressure.

—1.4.25 *Infectious Waste*

Includes: (1) equipment, instruments, utensils, and fomites (any substance that may harbor or transmit pathogenic organisms) of a disposable nature from the rooms of patients who are suspected to have or have been diagnosed as having a communicable disease and must, therefore, be isolated as required by public health agencies; (2) laboratory wastes including pathological specimens (i.e., all tissues, specimens of blood elements, excreta, and secretions obtained from patients or laboratory animals) and disposable fomites attendant thereto; (3) surgical operating room pathologic specimens and disposable fomites attendant thereto and similar disposable materials from out-patient areas and emergency rooms.

—1.4.36 *Intermediate Cover*

Cover material that is a minimum of twelve (12) inches in depth.

—1.4.37 *Incinerator*

A thermal device in which solid waste is burned for the purpose of volume reduction (an incinerator used to obtain energy shall be classified as a Resource Recovery Facility—q.v.).

—1.4.38 *Leachate*

Liquid that has been in contact with solid waste and contains dissolved or suspended materials from that solid waste.

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—1.4.39 *Lethal Chemical*

Ammunition, chemical or biological warfare agent, pyrotechnic material and military store of any kind capable of being used in inflict death or harm to man or his environment.

—1.4.40 *Lift*

A compacted layer of solid waste plus its overlying cover material in a sanitary landfill.

—1.4.41 *Municipal Solid Waste*

Residential, commercial and institutional solid waste generated within a community.

—1.4.42 *New Solid Waste Facility*

Any solid waste facility or portion thereof which does not qualify as an existing solid waste facility (q.v.).

—1.4.43 *Open Burning*

Any fire whose products of combustion are emitted directly into the open air, and are not directed thereto through the stack or chimney of an incinerator.

—1.4.44 *Pathological Waste*

See Infectious Waste

—1.2.45 *Person*

Any individual, corporation, company, association, society, firm, partnership, joint stock company or any political subdivision of this State or any agency or instrumentality thereof.

—1.4.46 *Putrescible Waste*

Any waste liable to enter into a state of putrefaction, the typically anaerobic splitting of proteins by bacteria and fungi with the formation of foul-smelling, incompletely oxydized products.

—1.4.47 *Recycling Facility*

Any place, equipment, or plant designed and/or operated to collect, store, process or to redistribute separated waste so as to return the material to market.

—1.4.48 *Registration*

See approved registration.

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—1.4.49 *Registration Statement*

An application for approved registration executed on forms provided by the Bureau and containing such information as may be required.

—1.4.50 *Residue*

Any material that remains after completion of thermal, mechanical or chemical processing.

—1.4.51 *Resource Recovery Facility*

Any place, equipment, device, or plant designed and/or operated to separate or process solid or liquid waste into usable secondary materials, including fuel and energy.

—1.4.52 *Runoff*

The liquid that drains from an area as surface flow.

—1.4.53 *Salvaging*

The controlled removal of waste materials from a solid waste disposal facility for reuse.

—1.4.54 *Sanitary Landfill*

The land disposal site employing an engineered method of disposal of solid waste in a manner that minimizes environmental hazards, including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequent basis.

—1.4.55 *Scavenging*

The uncontrolled removal of solid waste material.

—1.4.56 *Segregation*

The systematic division of solid waste into components.

—1.4.57 *Semi-liquid*

A mixture consisting of solid matter suspended in a liquid media (e.g. a slurry).

—1.4.58 *Septic Waste*

The solid, liquid, or semi-liquid waste removed from septic tanks or cesspools.

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—1.4.59 *Sewage Sludge*

The solid residue consisting of sewage solids combined with water and dissolved materials in varying amount.

—1.4.60 *Solid Waste*

Garbage, refuse, and other discarded materials resulting from industrial, commercial, and agriculture operations

and from domestic and community activities, and shall include all other waste materials including liquids disposed of incident thereto except it shall not include solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare, and feed such wastes to swine on their own farms.

—1.4.61 *Solid Waste Facility*

Any system, site, equipment or building which is utilized for the storage, collection, processing, transfer, transportation, separation, recycling, recovering, or disposal of solid waste.

—1.4.62 *Solid Waste Management*

The purposeful, systematic control of the generation, storage, collection, processing, transfer, transportation, separation, recycling, recovery, and disposal of solid wastes.

—1.4.63 *Storage*

The interim containment of waste after generation and prior to disposal.

—1.4.64 *Surface Water*

A body of water whose top surface is exposed to the atmosphere including a flowing body such as a river, as well as a standing body, such as a pond or lake, whose waters may reach any ground waters or classified surface waters of this state and shall include all waters of this state classified by the Department as FW-1, FW-2, FW-3, TW-1, TW-2, TW-3, CW-1 or CW-2.

—1.4.65 *Toe*

The bottom of the working face or side slope of a land disposal site where deposited solid waste is in contact with virgin ground or previous lift.

—1.4.66 *Transfer Station*

A facility at which solid waste is transferred from collection vehicles to haulage vehicles for transportation to a solid waste facility.

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—1.4.67 *Vector*

An organism, including insects, other arthropods, or rodents, that is capable of transmitting a pathogen from one organism to another.

—1.4.68 *Waste*

Useless, unwanted or discarded solid, semi-liquid, or liquid material.

—1.4.69 *Working Face*

That portion of a land disposal site where solid waste is discharged by a collection and/or haulage vehicle and is spread and compacted prior to placement of cover material.

—1.5 *Repeal of Regulations*

The provisions of the New Jersey Administrative Code 7:26-1 et seq., (formerly Chapter VIII—Refuse Disposal), a chapter of the New Jersey State Sanitary Code, adopted April 30, 1970, by the Public Health Council, to become effective July 1, 1970) are hereby repealed. This repeal shall not affect actions, proceedings, or departmental orders pending or outstanding on the effective date of the new regulation; said actions, proceedings, or departmental orders may be prosecuted, defended and continued in the same manner and to the same effect as if the new regulations had not been adopted. The adoption of these regulations shall not require the alteration of the engineering

design submitted for an existing solid waste facility providing that the implementation of all features contained in that engineering design will not fail to meet the operational requirements contained in these new regulations.

—1.6 *Reserved*

—1.7 *Variance*

Upon written presentation of acceptable evidence that deviation from these rules and regulations will satisfy the intent and purpose of these regulations, a variance may be granted by the Commissioner in accordance with the *Rules of Practice and Procedure for the Bureau of Solid Waste Management,* adopted pursuant to the Administrative Procedure Act (N. J. S. A. 52:14B-1 et seq.).

—1.8 *Reserved*

—1.9 *Penalties*

Penalties for violation of the provisions of these regulations shall be those provided by statute.

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7:26-2 Rules of the Bureau of Solid Waste Management Concerning Disposal

—2.1 *Dumps Prohibited*

—2.1.1 Dumps are hereby declared to be nuisances hazardous to human health and are prohibited.

—2.1.2 The disposal of solid waste in this State shall be made only through use of:

a. Sanitary Landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.

b. Incinerators constructed, operated and maintained in accordance with Regulations of the New Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.

c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter.

—2.2 *Registration*

—2.2.1 Registration statement: No person shall hereafter engage or continue to engage in disposal of solid waste in this State without first filing a completed registration statement with the Bureau for each disposal facility. The Registration Statement shall be signed by the person engaged in or desiring to engage in solid waste disposal, shall be executed on forms furnished by the Department, and shall state such information necessary and proper for the enforcement of this subchapter as the Department may require. An Engineering Design must be submitted with the Registration Statement.

—2.2.2 Approved registration: No person shall engage in disposal of solid waste in this State without having first obtained Departmental approval of the registration statement required under 2.2.1.

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—2.2.3 Approved engineering design: No new facility shall begin operations without first obtaining Departmental approval of the engineering design submitted with the registration statement; nor shall any existing facility continue to operate subsequent to receiving notice that the Department has disapproved the engineering design for

that facility. Failure to comply with the requirements of this subsection shall be cause for revocation of an approved registration for an existing facility or the denial of registration for a new installation.

–2.2.4 No person shall engage in disposal of solid waste in this state if such an operation does not meet the operational requirements listed in 7:26-2. In addition, each disposal facility must comply with any conditions or limitations which may be specified on the Approved Registration. Approved Registrations are further contingent upon implementation of all features contained in the approved engineering design.

–2.2.5 Prior to May 1, in each calendar year, each registrant shall submit to the Department, a statement updating the information contained in the initial registration statement. This update shall be on forms furnished by the Department. In no case shall submission of an updated statement alter the requirements of 7:26-2.2.4.

–2.2.6 The registrant shall notify the Department in writing within thirty (30) days of any change in status as listed on his current registration statement.

–2.2.7 The failure to submit an update registration statement and to submit all applicable fees (see 7:26-4) on or before July 1 of each calendar year shall be sufficient cause to revoke the approved registration of a solid waste facility.

–2.3 *Domestic Refuse*

The provisions of this subchapter shall not be applicable to disposal of family garbage, yard wastes or family refuse on the premises of one or two family dwellings where the family resides nor shall the provisions of this subchapter be interpreted as permitting disposal of domestic sewage in any manner other than that prescribed by law.

–2.4 *Submission of Engineering Designs*

Designs for Sanitary Landfills, Incinerators and other methods of disposal shall be prepared by a New Jersey licensed professional engineer and submitted to the Bureau for review. The designs shall conform to all rules and regulations for preparation and submission as required and in accordance with the Guidelines and Criteria for Preparation of an Engineering Design as set forth in 7:26-2.12 (as applicable).

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–2.5 *Sanitary Landfill Operational Requirements (General)*

–2.5.1 The width of the working face shall be kept as narrow as is consistent with the proper operation of trucks and equipment in order that the area of waste material exposed during the operating day is minimal. No working face shall exceed one-hundred fifty (150) feet in width when measured across the operating surface of the fill. Except where separate areas are designated on the Engineering Design for specific wastes, no more than one working face shall be in use at any one time.

–2.5.2 All deposited material shall be promptly spread and compacted to a uniform grade by use of equipment sufficient to achieve an inplace density of at least 700 pounds per cubic yard.

–2.5.3 No lift shall exceed twelve (12) feet in height.

–2.5.4 No new sanitary landfill shall be conducted where solid waste is or would be in contact with the surface or

ground waters of this state. This provision shall not apply to non-water soluble, non-decomposable inert solids such as:

(a) earth, rock, gravel, and concrete

(b) asphalt paving fragments

(c) glass

(d) clay and clay or ceramic products

No existing sanitary landfill may continue to deposit solid waste, except those noted in (a), (b), (c) and (d) above where solid waste is or would be in contact with the surface or ground waters of this state.

No new sanitary landfill shall be conducted, nor shall an existing landfill continue to be conducted where the solid waste, in whole or in part, or the leachate produced as a result of the sanitary landfill, impairs the quality of the surface or ground waters of this state to a degree that would degrade the quality of either the surface or ground waters of this state beyond the classification established by the Department for the surface water in question or the potable water standard established by the Department in the case of ground water. In those cases where the natural water quality fails to meet the established standards, the landfill operation shall not aggravate the condition.

–2.5.5 All lifts shall be graded so as to facilitate drainage therefrom. Side slopes and working face shall not exceed a verticle rise of one (1) foot for each horizontal distance of two (2) feet.

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–2.5.6 Control over the scattering of papers and other lightweight materials shall be effected by the use of movable fencing and/or other effective methods.

–2.5.7 Dust control shall be effectively implemented as quired.

–2.5.8 The operation of a solid waste facility shall not result in odors associated with solid waste being detected off site by sense of smell in any area of human use or occupancy.

–2.5.9 Equipment adequate for digging, spreading, compacting and/or covering shall be provided.

–2.5.10 When requested, by a representative of the Bureau or local Board of Health having jurisdiction the operator shall furnish proof that provisions have been made for the repair or replacement of equipment which becomes inoperative. Reasonable effort shall be taken to insure that faulty equipment shall not interfere with the proper operation of the facility and services provided.

–2.5.11 An adequate water supply and/or fire fighting equipment shall be readily available on site or on call to extinguish any and all fires. Fire fighting procedures shall be posted.

–2.5.12 Control of insects, other arthropods, and rodents shall be effected by means of a program directed by a qualified applicator of pesticides in accordance with the New Jersey Pesticide Control Code N. J. A. C. 7:30-1 et seq.

–2.5.13 All exposed surfaces of solid waste shall be covered with daily cover material, or intermediate cover material, or final cover material at the close of each operating day. The exposed surface of solid waste shall not exceed 15,000 square feet, and in no case shall any solid waste be exposed in excess of twenty-four (24) hours.

–2.5.14 No daily cover shall be exposed for any period exceeding twenty-four (24) hours.

–2.5.15 No intermediate cover shall be exposed for any period exceeding six (6) months.

–2.5.16 Final cover material shall be applied to any surface of the fill where the final planned elevation has been obtained, and to all surfaces when the landfill operation is terminated.

–2.5.17 The grade and thickness of cover material on all surfaces of the fill shall be maintained until stabilized.

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–2.5.18 There shall be stored within the boundaries of the landfill, a standby supply of cover material equal to twenty-five (25) percent of the volume of the landfill consumed in ten days at normal disposal rates.

–2.5.19 Only vehicles displaying the New Jersey Bureau of Solid Waste Management registration number and a current registration indicator shall be admitted for unloading of any solid waste at or near the active working face of a sanitary landfill when commercial type collection or haulage vehicles (including but not limited to compactor trucks, trailers, or any vehicle that tilts or uses other mechanical means to discharge its solid waste) are unloading or when heavy equipment is operating at the working face.

–2.5.20 Operators of sanitary landfills may elect to provide one or more containers of sufficient capacity within a designated secure area under the landfill's control (located a safe distance from the active working face and the movement of associated landfill equipment and commercial type collection and haulage vehicles) so that waste may

be unloaded from non-commercial automobiles and station-wagons and deposited therein under supervision of landfill personnel. Provision for bulky items may also be provided. The landfill operator shall be responsible for the sanitary condition and orderly appearance of the designated area. It shall be the operator's responsibility to remove the waste from the containers and to deposit it in the active working face and/or remove the bulky items from the area and deposit them in the designated landfill area at such frequency so as not to exceed the capacity of the area or containers. Scavenging is prohibited.

–2.5.21 New facilities shall install the gas venting and monitoring systems indicated on the approved engineering design prior to operating. A phase-in of the system is permitted if so indicated on the approved engineering design. Existing facilities shall be required to design, obtain departmental approval of the design, and implement a gas venting and monitoring system when so ordered by the Department as a result of the detection of landfill gases beyond the perimeter of the designated fill area. Detection may be by ground probing or vegetation damage. The recovery of landfill gases for use as a fuel is not prohibited by this subsection. In no case shall the accumulation of combustible gases in excess of their lower explosive limits within confined structures on or adjacent to the facility be permitted.

–2.5.22 No new solid waste facility shall begin operations without first installing a ground water monitoring system constructed and located in accordance with instructions furnished by the Department. Further, no new facility shall begin operations prior to obtaining ground water samples, and analyses thereof, for the purpose of establishing baseline information.

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Upon written notice from the Department that in the opinion of the Department, continued operation of an existing solid waste facility poses a real or potential threat to the quality of the ground waters of the State, the operator of the solid waste facility shall install a ground water monitoring system located and constructed in accordance with instructions furnished by the Department.

The taking and analyses of samples shall be done by a laboratory acceptable to the State using methods approved by the Department, copies of analyses shall be forwarded to the Bureau within thirty (30) days of sampling date.

The initial and annual (submitted with each updated registration statement) analyses shall include the following determinations.

a. presence of organisms of the Coliform Group
b. turbidity
c. color
d. taste
e. odor
f. Arsenic (As)
g. Barium (Ba)
h. Cadmium (Cd)
i. Chromium (hexavalent Cr^{+6})
j. Cyanide (CN)
k. Fluoride (F)
l. Lead (Pb)
m. Selenium (Se)
n. Silver (Ag)

o. A.B.S./L.A.S. (Alkyl-Benzene-Sulfonate and Linear-Alkyl-Sulfonate or similar methylene blue reactive substances contained in synthetic detergents.
p. Chloride (Cl)
q. Copper (Cu)
r. Hardness (as $CaCO_3$)
s. Iron $(Fe)^{++}$
u. Manganese $(Mn)^{++}$
v. Nitrate (NO_3)
w. Phenolic Compounds (as phenol)
x. Sodium (Na)
y. Sulfate (SO_4)
z. Total Dissolved Solids
aa. Zinc (Zn)
bb. C.O.D.
cc. B.O.D.

Each third month the analyses shall include the following determinations:

a. Chloride (Cl)
b. Hardness (as $CaCO_3$)
c. Iron $(Fe)^{++}$
d. Phenolic Compounds (as phenol)
e. Total Dissolved Solids
f. C.O.D.
g. B.O.D.

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–2.5.23 No new solid waste facility shall be initiated nor shall an existing solid waste facility continue within the restricted zone of an airport listed in 7:26-2.5.24 when such

a facility presents a real or potential attraction for birds, until an effective deterent plan shall be implemented. For the purpose of this rule, the restricted zone shall be defined as a two and one half (2½) mile radius centered on the geographic center of the runways.

–2.5.24 The airports referred to in 7:26-2.5.23 are as follows:

Airport	Near
Atlantic City (Pomona)	Atlantic City, NJ
Bader	Atlantic City, NJ
Cape May County	Cape May, NJ
Greater Wilmington	Wilmington, DEL
Linden	Linden, NJ
NAS Lakehurst	Lakehurst, NJ
McGuire AFB	Wrightstown, NJ
Mercer County	Trenton, NJ
Millville	Millville, NJ
Morristown	Morristown, NJ
Newark	Newark, NJ
North Philadelphia	Philadelphia, PA
Philadelphia International	Philadelphia, PA
Teterboro	Teterboro, NJ

Others as designated by the Department.

–2.5.25 After July 1, 1975, the solid waste content of all collection and haulage vehicles shall be determined by weight through the use of appropriate scales at the disposal facility. This subsection shall not apply to:

a. liquid or semi-liquid waste measured in gallons.

b. waste delivered by non-commercial automobiles or station-wagons.

c. waste delivered to solid waste facilities which receive less than twenty (20) trucks and less than five hundred (500) cubic yards, and less than one hundred (100) tons in any one day.

d. waste the weight of which is determined by use of public scales.

e. vegetative waste delivered to solid waste facilities authorized to receive only such waste.

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–2.5.26 The operator of a sanitary landfill shall maintain a record of the quantity accepted for disposal of each category of waste listed on the registration statement. The compilation of the records for the previous twelve months shall be furnished on the annual update registration statement. In the event that scales were not used to physically weigh the waste, volume to weight conversions shall be made by means of formulae furnished by the Department.

–2.6 *Sanitary Landfill Operational Requirements (Specified)*

–2.6.1 Sewage Sludge, Septic Tank and Catch-basin Clean-outs and Other Fecal Material.

–2.6.1.1 No sewage sludge, septic tank or catch-basin clean-out or other fecal material of human or animal origin, liquid or solid, shall be lagooned. All such material shall be immediately and thoroughly mixed with garbage and refuse to attain complete absorption (no free moisture) or shall be discharged into a covered subterranean system sealed from the atmosphere in such a manner as to contain odors and prevent migration of vectors, or shall be converted into an inert non-leaching solid substance, or discharged into a sewage treatment plant.

–2.6.1.2 Cover material shall be applied no later than at the conclusion of the day's operation (immediately if practicable) to all areas whereon sewage sludge, septic tank or catch-basin clean-out or other fecal material of human or animal origin, liquid or solid, has been deposited. Cover over such areas shall in no case be less than twelve (12) inches in depth.

–2.6.1.3 Any solid waste facility accepting sewage sludge, septic tank or catch-basin clean-out or other fecal material of human or animal origin, liquid or solid, for disposal on or in the ground, shall install monitoring wells which are constructed and located in accordance with Department instructions. Samples shall be taken from each well and analyzed by a laboratory acceptable to the Department at least once every three months. Analyses shall be made for the presence of organisms of the Coliform Group and for other determinations as required by the Department. Results of analyses shall be furnished to the Department within thirty (30) days of sampling. Should monitoring well analyses indicate objectionable coliform levels, or if oozing, the presence of seepage, or other ground conditions indicate saturation of the soil, the facility shall discontinue immediately the acceptance of sewage sludge, septic tank and catch-basin clean-outs and other fecal material until such time that in the opinion of the Department, acceptance may resume.

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–2.6.2 Bulky Wastes

–2.6.2.1 Bulky items which are to be placed in the cell of a landfill shall be reduced to the smallest size practicable.

–2.6.2.2 Bulky items shall not be permitted to protrude through the final surface or side slopes of a landfill.

–2.6.2.3 If so indicated on the engineering design, separate areas of a landfill operation may be designated solely for the storage of salvageable bulky wastes (excluding those mixed with putrescible wastes) while awaiting recovery or disposal. Material so handled may be stored without cover for seven (7) days (at no time shall the storage area exceed 50 feet in any direction). Salvage material shall not be stored on the active fill area.

–2.6.3 Radioactive Materials and Lethal Chemicals

–2.6.3.1 Radioactive materials regulated by the Atomic Energy Act of 1954 and lethal chemicals shall not be deposited in or upon the land or waters of the State of New Jersey nor incinerated within the territory governed by the State of New Jersey without prior approval in writing by all authorities having jurisdiction in such matters and by the New Jersey Department of Environmental Protection.

–2.6.4 Pesticides (or Contaminated Containers), Hazardous Wastes, Chemical Wastes, Bulk Liquids and Semi-Liquids.

–2.6.4.1 *Responsibility of the Generator or Owner of the Waste.* It shall be the responsibility of the generator or owner of pesticides (or Contaminated containers), hazardous wastes, chemical wastes, bulk liquids, and semi-liquids to identify and label such materials in accordance with Part 172 et seq., Title 49, Code of Federal Regulations (D. O. T.). It shall be the responsibility of the generator or owner to assure that the selected carrier transporting such materials is one registered with the Bureau of Solid Waste Management, and that the shipment is consigned to a solid waste facility registered with and authorized by the Bureau for the disposal of that specific waste. A shipping document shall be furnished to the carrier by the generator or owner of the waste which

lists all material contained in the shipment, their quantities, the designated disposal facility and any instructions necessary for their safe handling. The generator or owner of such waste, the registered operator of the solid waste facility, the authority having jurisdiction in such matters and the New Jersey State Department of Environmental Protection shall jointly

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determine the method of disposal. It shall be the responsibility of the generator or owner of *hazardous wastes* to furnish to the New Jersey Bureau of Solid Waste Management, annually by the 15th day of February, a list of all such waste materials transferred from his control during the preceding calendar year. The list shall identify the material, the quantity, the type of container in which dispatched, its marking, the carrier including the N. J. B. S. W. M. code number, the date shipped, the shipping document reference number, and the destination.

–2.6.4.2 *Responsibility of the Registered Operator of the Solid Waste Facility.* It shall be the responsibility of the registered operator of each solid waste facility to maintain records and furnish to the New Jersey Bureau of Solid Waste Management a list of all hazardous wastes received for disposal, treatment, or storage during the past calendar year. The list shall be forwarded by the 15th day of February annually. The list shall identify the material, the source, quantity, type of container in which disposed or stored, if any, and how marked, carrier delivering the material (including the N. J. B. S. W. M. code number), shipping document reference number, date received, type of treatment if any, and the location where disposed or stored (this last item should be exact enough to permit recovery of the material if so desired.

–2.6.4.3 Any solid waste facility accepting pesticides (or contaminated containers), hazardous wastes, chemical wastes, bulk liquids or semi-liquids for disposal or storage on or in the ground, shall install monitoring wells which are constructed and located in accordance with instructions available from the Department. Samples shall be taken from each well and analyzed by a laboratory acceptable to the Department at least once every three months. Analyses shall be made for all determinations listed in –2.5.22 and any other determinations specified by the Department. Results of the analyses shall be furnished to the Department within thirty (30) days of sampling. Should monitoring well analyses or any other means of detection indicate a real or potential threat to the quality of the waters of this State by the solid waste facility, the acceptance of pesticides, hazardous wastes, chemical wastes, bulk liquids or semi-liquids shall be discontinued immediately. An acceptable system of interception, collection, and treatment shall be implemented at once and such treatment shall continue until the threat to the water of the State by the solid waste facility shall no longer exist. Prior

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to reacceptance of the discontinued material, an engineering design acceptable to the Department which describes corrective measures to prevent recurrence of the threat must be submitted and the design implemented.

–2.6.4.4 Beginning March 15, 1975, no solid waste facility shall accept or receive for disposal on or in the lands of this State any pesticide (or contaminated containers), hazardous waste, chemical waste, bulk liquid or semi-liquid unless such facility has installed a system for the inter-

ception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the Department for the entire system. Requests for Department approval may be in the form of an addendum to the engineering design submitted under 7:26-2.2.3 and in accordance with 7:26-2.4, shall be prepared by a New Jersey licensed professional engineer, and shall include detailed engineering drawings and specifications of the proposed system. In addition, requests for Department approval shall specify the exact nature and quantity of each waste to be accepted at the facility, the method of handling and treating those wastes, and shall include proof that all necessary permits and licenses have been obtained for any discharge into the waters of the State.

–2.6.5 *Infectious Waste*

The generator or owner of infectious waste shall be responsible for rendering such waste non-infectious prior to removal from the premises where generated and for certifying to the registered operator of the solid waste facility where assigned and the Bureau that such waste has been rendered non-infectious.

–2.7 *Disrupted Landfill Requirements*

–2.7.1 Written approval shall be obtained from the Department prior to any excavation, disruption, or removal of any deposited material from either an active or discontinued landfill.

–2.7.2 All requests for approval shall include an operational plan stating the area involved, depth of such excavation with final grades, estimated cubic yards of material to be excavated, site where excavated material is to redeposited and estimated time required for completion of excavation procedures.

–2.7.3 All excavation shall be confined to an area consistent with the number of pieces of digging equipment and/or trucks used for haulage.

–2.7.4 Adequate measures shall be taken during excavation to control dust, odors, fires, rodents, insects, and blowing litter.

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–2.7.5 The deposition of all redeposited solid waste resulting from excavation shall be in conformity with all requirements of this subchapter.

–2.8 *Smoking, Smoldering or Burning Landfill*

–2.8.1 In the case of a fire on an active disposal facility the responsibility shall lie with the registered operator. In the case of a fire on a discontinued or unregistered disposal operation, the responsibility shall lie with the person having the title to the premises whereupon the fire exists.

–2.8.2 The operator of any active landfill where smoldering, smoking, or burning is occurring shall immediately notify the police and fire departments having jurisdiction, and the Bureaus of Solid Waste Management and Air Pollution Control.

–2.8.3 The operator of any active landfill shall be responsible for initiating and continuing fire fighting actions until all smoldering, smoking, and burning cease.

–2.8.4 The operator of any landfill shall seek and obtain fire-fighting assistance if smoldering, smoking, or burning persists for longer than twenty-four (24) hours.

–2.8.5 The operator of any landfill shall not conduct disposal activities within the immediate vicinity of any

smoldering, smoking, or burning condition. Precautions shall be taken to prevent disposal activities from interfering with fire-fighting activities.

–2.8.6 Any disruption of the finished grade or covered compacted surfaces shall be repaired and recovered upon completion of fire-fighting activities.

–2.8.7 Control and prohibition of air pollution from refuse disposal and salvage operations shall be effected through compliance with the New Jersey Administrative Code (N. J. A. C.) 7:27-2.1 et seq., Control and Prohibition of Open Burning.

–2.9 *Termination or Change of Ownership of a Landfill*

–2.9.1 The registered operator of any landfill shall notify in writing the State Department of Environmental Protection, and utilities shall petition the Public Utilities Commission pursuant to its rules and regulations of his intent to discontinue operations thereon, at least 30 days prior to the intended date of discontinuance.

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–2.9.2 The State Department of Environmental Protection shall examine all sanitary landfills upon discontinuance of operations to determine whether there is compliance with the New Jersey Administrative Code (N. J. A. C.) 7:26-2, the Rules of the Bureau of Solid Waste Management Concerning Disposal.

–2.9.3 Upon termination of the landfill, a detailed description of the landfill shall be recorded, along with the deed, with the appropriate County Hall of Records. The description shall include the general types and locations of wastes on the site, the depth of fill, the depth and type of cover material, the dates the landfill was in use, and all

such other information as may be of interest to potential landowners.

–2.9.4 Any landfill that is terminated under the provisions of this subchapter must be maintained in accordance with the landfill design submitted and must remain in compliance with all regulations of this subchapter. Responsibility for the maintenance of discontinued operations shall rest with the property owner of record.

–2.10 *Reserved*

–2.11 *General Operational Requirements for Incinerators, Transfer Stations, Processing Facility, and Resource Recovery Facilities*

–2.11.1 Within each twenty-four hour period, the operator of the facility shall clean each area where putrescible waste has been deposited or stored.

–2.11.2 No putrescible waste shall be stored longer than 24 hours at the facility without acceptable treatment to prevent putrefaction.

–2.11.3 Control over the scattering of papers and other lightweight materials shall be effected by the use of fencing and/or other effective methods.

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–2.11.4 Dust control shall be effectively implemented as required.

–2.11.5 The operation of the solid waste facility shall not result in odors associated with solid waste being detected off site by sense of smell in any area of human use or occupancy.

–2.11.6 When requested, the operator shall furnish proof that provisions have been made for the repair or replace-

ment of equipment which becomes inoperative. Reasonable effort shall be taken to insure that faulty equipment shall not interfere with the proper operation of the facility and services provided.

–2.11.7 An adequate water supply and/or fire fighting equipment shall be readily available on site or on call to extinguish any and all fires. Fire fighting procedures shall be posted.

–2.11.8 Control of insects, other arthropods, and rodents shall be effected by means of a program directed by a qualified applicator of pesticides in accordance with the New Jersey Pesticide Control N. J. A. C. 7:20-1 et seq.

–2.11.9 Only vehicles displaying the New Jersey Bureau of Solid Waste Management registration number and a current registration indicator shall be admitted for unloading of any solid waste at or near the active tipping area of the solid wastes facility when commercial type collection or haulage vehicles (including not limited to compactor trucks, trailers, or any vehicle that tilts or uses other mechanical means to discharge it solid waste) are unloading or when other heavy equipment is operating at the tipping area.

–2.11.10 Operators of solid waste facilities may elect to provide one or more containers of sufficient capacity within a designated secure area under the facility's control (located a safe distance from the tipping area and the movement of associated equipment and commercial type collection and haulage vehicles) so that waste may be unloaded from non-commercial automobiles and station-wagons and deposited therein under supervision of facility personnel. Provision for bulky items may also be provided. The facility operator shall be responsible for the sanitary condition and orderly appearance of the designated area.

It shall be the operator's responsibility to remove the waste from the containers and to deposit it in the tipping area and/or remove the bulky items from the area and transfer them to the appropriate unloading area at such frequency so as not to exceed the capacity of the area or containers. Scavenging is prohibited.

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–2.11.11 After July 1, 1975, the solid waste content of all collection and haulage vehicles shall be determined by weight through the use of appropriate scales at the disposal facility. This subsection shall not apply to:

a. liquid or semi-liquid waste measured in gallons.

b. waste delivered by non-commercial automobiles or station-wagons.

c. waste delivered to solid waste facilities which receive less than twenty (20) trucks and less than five hundred (500) cubic yards, and less than one hundred (100) tons in any one day.

d. wastes the weight of which is determined by use of public scales.

e. vegetative waste delivered to solid waste facilities authorized to receive only such waste.

–2.11.12 The operator of a solid waste facility shall maintain a record of the quantity accepted for disposal of each category of waste listed on the registration statement. The compilation of the records for the previous twelve months shall be furnished on the annual update registration statement. In the event that scales were not used to physically weigh the waste, volume to weight conversion shall be made by means of formulae furnished by the Department.

–2.11.13 Radioactive materials regulated by the Atomic Energy Act of 1954 and lethal chemicals shall not be received or stored at any solid waste facility within the territory governed by the State of New Jersey without prior approval in writing by the authorities having jurisdiction in such matters and by the New Jersey Department of Environmental Protection.

–2.11.14 Pesticides, Hazardous Wastes, Chemical Wastes, Bulk Liquids and Semi-Liquids.

–2.11.14.1 *Responsibility of the Generator or Owner of the Waste.* It shall be the responsibility of the generator or owner of pesticides (or contaminated containers), hazardous wastes, chemical wastes, bulk liquids, and semiliquids to identify and label such material in accordance with Part 172 et seq., Title 49, Code of Federal Regulations (D.O.T.). It shall be the responsibility of the generator or owner to assure that the selected carrier transporting such materials is one registered with the Bureau of Solid Waste Management, and that the shipment is consigned to a solid waste facility registered with and authorized by the Bureau for the disposal of that specific waste. A shipping document shall be furnished to the carrier by the generator or owner of the waste which lists all material contained in the shipment, their quantities, the designated disposal facility and any instructions necessary for their safe handling. The generator or owner of such waste, the registered operator of the

[26]

solid waste facility, the authority having jurisdiction in such matters and the New Jersey State Department of Environmental Protection shall jointly determine the method of disposal. It shall be the responsibility of the

generator or owner of such wastes to furnish to the New Jersey Bureau of Solid Waste Management, annually by the 15th day of February, a list of all *hazardous waste* materials transferred from his control during the preceding calendar year. The list shall identify the material, the quantity, the type of container in which dispatched, its marking, the carrier including the N. J. B. S. W. M. code number, the date shipped, the shipping document reference number, and the destination.

–2.11.14.2 *Responsibility of the Registered Operator of the Solid Waste Facility.* It shall be the responsibility of the registered operator of each solid waste facility to maintain records and furnish to the New Jersey Bureau of Solid Waste Management a list of all *hazardous wastes* received for disposal, treatment, or storage during the past calendar year. The list shall be forwarded by the 15th day of February annually. The list shall identify the material, the source, quantity, type of container in which disposed or stored if any and how marked, carrier delivering the material (including the N. J. B. S. W. M. code number), the shipping document reference number, date received, type of treatment if any, and the location where disposed or stored (this last item should be exact enough to permit recovery of the material if so desired), or the destination if forwarded to another facility.

–2.11.15 *Infectious Waste*

The generator or owner of infectious waste shall be responsible for rendering such waste non-infectious prior to removal from the premises where generated and for certifying to the registered operator of the solid waste facility where assigned and the Bureau that such waste has been rendered non-infectious.

–2.12 *Guidelines and Criteria for Preparation of Engineering Designs*

–2.12.1 *General*

–2.12.1.1 A minimum of six (6) complete sets of drawings for each design shall constitute a submission.

–2.12.1.2 Individual drawing sheets shall not exceed 30" x 42" in size.

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–2.12.1.3 Each drawing sheet shall bear the raised seal of the New Jersey licensed professional engineer responsible for preparation of the design. It is recommended that a geologist be employed to prepare the subsurface data and interpretation.

–2.12.1.4 A key map shall be provided showing the general location of the proposed disposal facility. Key map is to be plotted on 1:24,000 U.S.G.S. topographical quadrangle.

–2.12.1.5 A plot plan which depicts the legal boundaries determined by survey for which clear title is held by the applicant shall be provided. If the property is leased by the applicant, a copy of the lease agreement shall accompany the plot plan.

–2.12.1.6 Lot and Block numbers of the property shall be provided.

–2.12.1.7 Approximate total acreage of the property shall be determined and shown.

–2.12.1.8 Location of the geographic center of runways of airports within two and one-half (2½) miles of the property line of the solid waste facility shall be shown.

–2.12.2 *Sanitary Landfills*

–2.12.2.1 The specific limits or portion of the proposed active landfill operation shall be clearly defined with permanent markers or equivalent. Review and approval of any submission will be restricted to only that portion of the total acreage for which all design criteria is provided.

–2.12.2.2 Existing topographical contours of the property and proposed final elevations shall be shown at a maximum of five (5) foot intervals. Horizontal scale shall be at least one (1) inch to two hundred (200) feet. Two (2) foot contour intervals and a scale of one (1) inch to one hundred (100) feet is preferred. Elevations shall be based on the New Jersey Geodetic Control Survey datum. Use of any other datum must be supported by an explanatory statement and an equation to the N. J. G. C. S. datum.

–2.12.2.3 The area wide sequence of development stages of the landfill operation shall be shown. A narrative description of the planned method of operation (including heavy equipment) shall be submitted to supplement the design drawing.

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–2.12.2.4 Soil borings of the property shall be provided in accordance with the following table:

Acreage	*Minimum Number of Borings*
1 –10	3
10 –50	6
50 –100	12
100–200	18
over 200	minimum 24

–2.12.2.5 All borings shall be to a minimum depth of ten (10) feet below the seasonally adjusted maximum ground

water elevation or twenty (20) feet below the lowest elevation of the proposed fill.

–2.12.2.6 Profiles shall be shown for each boring giving the depths of each soil classification and the elevation of any ground water or aquifer encountered, and shall include the date each boring was taken.

–2.12.2.7 A geological and ground water map shall be provided showing ground water levels and the direction(s) of flowing for all surface and ground waters within a one-half (½) mile radius of the proposed landfill operation.

–2.12.2.8 All registered wells within a one-half (½) mile radius of the proposed landfill operation shall be plotted.

–2.12.2.9 All public buildings within a one-half (½) mile radius of the proposed landfill shall be plotted and identified.

–2.12.2.10 All surface and subsurface drains which are used to control the passage of water from areas on, or adjacent to, the landfill property shall be shown.

–2.12.2.11 If a design includes an impermeable liner under the fill area, the method of collection and treatment of leachate generated within the fill shall be detailed.

–2.12.2.12 All fill areas or excavations shall be shown to terminate no closer than fifty (50) feet from all property boundary lines.

–2.12.2.13 Detailed profile views for any excavation on the property and the manner of filling the excavation shall be shown.

–2.12.2.14 Detailed profile views showing grades and elevations for any and all dikes, berms or other pollution protective devices or techniques as may be required and

constructed, shall be provided. No grade or slope shall exceed a ratio of 2:1.

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–2.12.2.15 All proposed landscaping, beautification, and screening techniques shall be shown.

–2.12.2.16 The system to provide for venting and monitoring of gases generated within the fill shall be shown in detail.

–2.12.2.17 Monitoring wells to determine ground water quality shall be plotted and construction described.

–2.12.2.18 The estimated capacity of the site in tons shall be calculated, inplace density given, and projections made to determine the life expectancy of the site based on current and/or anticipated loadings.

–2.12.2.19 A completed Supplemental Engineering Data form shall be submitted with the design. (Forms are available from the Bureau of Solid Waste Management).

–2.12.2.20 An environmental impact statement, if required, shall be submitted to the Department.

–2.12.2.21 Copies of all departmental permits as may be required or written proof of application therefor, due to stream encroachment or flood plain involvement and copies of all titles for lands involved in riparian lands or wetlands (together with land use permits) shall be submitted.

–2.12.2.22 If known, use of the site after closure shall be detailed including the time frame for implementation.

–2.12.3 *Incinerators*

–2.12.3.1 The rated capacity (in both tons per day and tons per hour) of the facility shall be shown.

–2.12.3.2 The current daily loadings and any anticipated or projected future loadings shall be shown.

–2.12.3.3 Unloading and storage facilities shall be shown and explained in detail including capacities in cubic yards and time such facilities can be practically used based on current loadings.

–2.12.3.4 Any emergency unloading, storage facilities or disposal facility to be used when down time of the incinerator will exceed twenty-four (24) hours, shall be shown and explained.

–2.12.3.5 Alternate unloading locations or plans for transfer in the event down time of the facility exceeds forty-eight (48) hours shall be shown and explained.

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–2.12.3.6 Rodent and odor control techniques to be employed shall be explained.

–2.12.3.7 Daily quantity of residue tonnage from the facility shall be shown.

–2.12.3.8 Disposal location for all residue (including but not limited to by-products resulting from air pollution control devices, quench water, etc.) shall be made known.

–2.12.3.9 Any recycling or reclamation activities operated in conjunction with the facility either on the incoming solid waste or the outgoing residue, shall be described in detail.

–2.12.4 *Transfer Stations and Resource Recovery Facilities*

–2.12.4.1 A completed registration application form shall be submitted.

–2.12.4.2 A descriptive statement of the process used and operation at this facility shall be prepared and submitted.

–2.12.4.3 Site location map, including lot and block numbers, access roads and other geographic features shall be shown.

–2.12.4.4 Drawings of buildings and other structures–showing type of construction, layout and dimensions for unloading, storage, compaction, processing, and loading areas, type of floor, and closures shall be included.

–2.12.4.5 The means to control litter, odors, rodents, and insects shall be described.

–2.12.4.6 The description of equipment shall include type, capacity, and number of units.

–2.12.4.7 Daily capacity of the complete facility in tons shall be shown.

–2.12.4.8 Design capacity as to number and type of vehicles bringing solid waste to the facility daily shall be delineated.

–2.12.4.9 Design capacity as to number and type of transfer vehicles hauling waste or reclaimed material from the facility shall be shown.

–2.12.4.10 A description of provisions to handle unusual peak loadings, exceeding planned capacity shall be provided.

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–2.12.4.11 Emergency provisions for equipment breakdown or power failure shall be described.

–2.12.4.12 The maximum length of time solid waste will be stored in the facility shall be indicated.

–2.12.4.13 Measures taken to protect and monitor the quantity of ground water and nearby surface streams shall be shown if the station is to handle liquid and/or liquid-solid mixture wastes.

–2.12.4.14 Measures taken to monitor and control combustible gases where these will be generated shall be described in detail.

–2.12.4.15 Seal of the professional engineer responsible for the design is to be affixed on the plan.

–2.12.5 *Other Methods of Disposal*

–2.12.5.1 All appropriate Guidelines and Criteria from 7:26-2.12.1 to 2.12.4 shall be followed for the preparation of the engineering design and any such data and information as may be necessary so that the Bureau can make an evaluation shall be provided.

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7:26-3 Rules of the Bureau of Solid Waste Management Concerning Collection and Haulage

–3.1 *Improper Collection or Haulage Prohibited*

–3.1.1 The collection and haulage of organic and/or combustible matter or other forms of solid waste on the roadways and highways in this State shall be made only through the use of:

a. Collection and/or haulage systems established, operated and maintained in accordance with the regulations set forth in this subchapter.

b. Other methods of collection and haulage as may be approved by the State Department of Environmental Protection.

–3.2 *Registration*

–3.2.1 Registration statement; filing with the Department. No person shall engage or continue to engage in the collection and/or haulage of solid waste in this State without first filing a completed Registration Statement with the Bureau. The Registration Statement shall be signed by the person engaged in or desiring to engage in the collection and/or haulage of solid waste, shall be executed on forms prescribed by and furnished by the Bureau, and shall state such information necessary and proper to enforcement of this subchapter as the Department may require.

–3.2.2 Approved Registration. No person shall engage in the collection and/or haulage of solid waste in this State without having an Approved Registration from the Department.

–3.2.3 No person shall engage in the collection and/or haulage of solid waste in this State if such an operation does not meet the collector-hauler requirements listed in 7:26-3. In addition, the operation must comply with any other conditions or limitations which may be specified on the approved registration.

–3.2.4 Time for filing. Prior to May 1 in each calendar year, each registrant shall submit to the Department a statement updating the information contained in the registration statement. Such information shall be submitted on forms supplied by the Department. In no case shall the submission of an updating registration statement alter the conditions under which the approved registration is granted.

–3.2.5 Alteration of Registration Statement. The registrant shall notify the Department in writing within 30 days

of any change of information supplied on his current Registration Statement.

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—3.3 *Domestic Refuse*

—3.3.1 The provisions of this subchapter shall not be applicable to haulage in family passenger automobiles or station-wagons of family garbage or refuse off the premises where the family resides nor shall the provision of these rules be interpreted as permitting the haulage of domestic sewage in any manner other than that prescribed by law. vehicles not registered with the Bureau of Solid Waste Management are not permitted to discharge solid wastes at or near areas where commercial type collection or haulage vehicles are unloading or where heavy equipment is operating.

—3.4 *Collector-Hauler Requirements (General)*

—3.4.1 Length of service routes shall be kept consistent with the proper operation of trucks and/or equipment in order that the area or route services can be completed during a normal operating day.

—3.4.2 All collected solid waste shall be properly deposited at an approved facility in accordance with the New Jersey Administrative Code (N. J. A. C.) 7:26-1 and 7:26-2.

—3.4.3 Unless an emergency, such as inclement weather, equipment breakdown, or accident warrants, no solid waste shall be allowed to remain or be stored in any collection or haulage vehicles in excess of twenty-four (24) hours.

—3.4.4 No vehicle shall be used for collection and/or haulage if the design of the vehicle is such that any solid waste material will spill onto the roadways and highways of this State.

—3.4.5 No vehicle used for collection and/or haulage shall be used beyond its design capabilities or in such a manner that littering and spillage of solid wastes onto the roadways and highways of this State will occur.

—3.4.6 All vehicles used for the collection and/or haulage of solid waste shall be maintained in good working condition to protect the health and safety of the workmen and citizens of this State and to provide prompt and efficient service. The registered operator of any collection and/or haulage system shall provide a means of continuous service in the event an emergency arises.

—3.4.7 All workmen or collection crews operating solid waste collection systems shall take reasonable care to protect the property of customers being served. Any damage or spillage of solid waste as a result of the collector's actions shall be his responsibility.

—3.4.8 All vehicles used for the collection and haulage of solid waste shall properly and conspicuously display all numbers and decals assigned by the Bureau of Solid Waste Management.

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—3.4.9 Tarpaulins or covers shall be provided and used as needed while transporting solid wastes.

—3.5 *Collector-Hauler Requirements (Specific)*

—3.5.1 Sewage Sludge and Other Fecal Material

—3.5.1.1 All vehicles used for the collection and/or haulage of such wastes shall be of such a design so as to preclude any spillage or leakage onto the roadways and highways of the State.

—3.5.1.2 Sewage sludge and other fecal material shall not be inter-mixed with other wastes of a chemical or industrial nature for haulage to a disposal operation.

—3.5.2 Bulky Wastes

—3.5.2.1 All vehicles used for collection and/or haulage of such wastes shall be such a design so as to preclude any spillage onto the roadways and highways of the State.

—3.5.3 Radioactive Materials and Lethal Chemicals

—3.5.3.1 Radioactive materials regulated by the Atomic Energy Act of 1954 and lethal chemicals shall not be transported in or through the State of New Jersey without prior approval in writing by all authorities having jurisdiction in such matters and by the New Jersey Department of Environmental Protection.

—3.5.4 Hazardous and/or Chemical Wastes, Excluding All Radioactive Wastes.

—3.5.4.1 All collectors and haulers of such wastes shall obtain from the generator of such wastes a bill of lading listing the material(s) to be hauled. Such waste shall not be mixed with other categories of wastes in shipment.

—3.5.4.2 All collectors and haulers of such wastes are responsible for operating within existing laws governing the transportation of such materials including Chapter 128, PL 1950.

—3.5.4.3 All vehicles used for the collection and haulage of such wastes shall be of a design to preclude any spillage or leakage onto the roadways and highways of the State.

—3.5.4.4 Collectors and haulers of such wastes shall not transport drummed hazardous wastes whereby said drums or containers are damaged, rusted, leaking, or without proper tight fitting covers or lids.

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—3.5.4.5 All drums and containers of hazardous or chemical wastes in transport to a disposal facility shall be properly labeled in accordance with existing statute and regulations of the State of New Jersey.

—3.6 *Reserved*

—3.7 *Smoking, Smoldering, or Burning Solid Waste in Collection or Haulage Vehicles*

—3.7.1 No collector or hauler shall provide service where waste materials to be picked up and hauled show evidence of smoking, smoldering, or burning.

—3.7.2 All waste in transit that must be dumped in an emergency due to smoking, smoldering, or burning shall be the responsibility of the collector-hauler. The operator of the vehicle shall immediately notify the police and fire departments having jurisdiction. The collector or hauler shall be responsible for clean-up of all materials dumped in an emergency.

—3.8 *Reserved*

—3.9 *Reserved*

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7:26.4 Rules of the Bureau of Solid Waste Management Concerning Fees

—4.1 *General*

—4.1.1 In accordance with Chapter 461, P. L. 1971, there is hereby established a Fee Schedule. Said schedule shall apply to all sanitary landfill operations, incinerators, transfer stations, processing facilities, resource recovery facilities or any other methods of disposal requiring registration

with the Department, and shall include but not be limited to all vehicles used in collection and/or haulage of solid wastes.

—4.2 *Payment of Fees*

Fees shall be paid by certified check or money order and made payable to: Treasurer, State of New Jersey.

—4.3 *Fee Schedule*

—4.3.1 *Solid Waste Facilities*

Submission of an Engineering Design for review (per design)	$500.00
Submission of Registration Statement or Annually with Updated Registration Statement	500.00
Transfer of Registration	50.00

—4.3.2 *Solid Waste Collection and Haulage*

Submission of Registration Statement or Annually with Updated Registration Statement

First vehicle	45.00
Each additional vehicle on the same registration	5.00

The registration of a Solid Waste Collection and/or Haulage System is non-transferable.

—4.4 *Resubmission of Designs*

The fee for review of an engineering design for a solid waste facility will entitle the registrant to submit or resubmit all information found deficient on the first submission until such time as the approval of the engineering design is granted or denied.

—4.5 *Reserved*

NEW JERSEY STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF SOLID WASTE MANAGEMENT
P.O. BOX 2807
TRENTON, N.J. 08625

REGISTRATION STATEMENT FOR A SOLID WASTE FACILITY

A SEPARATE REGISTRATION IS REQUIRED FOR EACH SOLID WASTE FACILITY

INCOMPLETE OR IMPROPERLY PREPARED STATEMENTS WILL BE RETURNED.
— PRINT OR TYPE ONLY —

1. If the above name and address of registrant is incorrect or missing enter corrected information where indicated. (Use SSN ONLY if you do not have a FEID number)

F Federal Employer ID No. OR S Soc. Sec. No.

APPLICANT'S - LAST NAME | FIRST NAME | TITLE

COMPANY OR TRADE NAME

STREET ADDRESS

CITY | STATE | ZIP CODE | TELEPHONE NUMBER AREA

2. ☐ NEW STATEMENT ☐ UPDATED STATEMENT REGISTRATION NO.

3. TYPE ORGANIZATION (CHECK ONLY ONE)

☐ SOLE PROPRIETOR ☐ PARTNERSHIP ☐ INCORPORATED ☐ MUNICIPALITY
☐ COUNTY ☐ UNIT OF STATE GOV. ☐ AUTHORITY
☐ OTHER (EXPLAIN) _____

4. SOLID WASTE FACILITY DATA

STREET ADDRESS OF FACILITY | MUNICIPALITY (CITY)

COUNTY | BLOCK NO. | LOT NO. | THROUGH | LOT NO.

If property description has additional block and lot information, attach a separate sheet including all block and lot data. Check this box to indicate additional data. ☐

A. LICENSED BY PUC ☐ NO ☐ YES (If yes give PUC Certificate No.)

B. ESTIMATED REMAINING LIFE OF THIS FACILITY. (BASED ON PRESENT USE RATE) YEARS AND 0 0 0 TONS

C. THIS PROPERTY ☐ OWNED OR ☐ LEASED BY APPLICANT

PAGE 1

APPENDIX A

D

6. PROPERTY TITLE DATA

A. CERTIFIED COPY OF TAX MAP SHOWING BLOCK & LOT NOS.

ATTACHED [30] PREVIOUSLY SUBMITTED [30] DATE SUBMITTED [31 MO | DAY | YR.]

E

B. [37] OWNERS - LAST NAME [53] FIRST NAME [67]

[13] STREET ADDRESS

[28] CITY [57] STATE [64] ZIP CODE

C. IF LEASED - 1. LEASE ENCLOSED [39] 2. PREVIOUSLY SUBMITTED [39] DATE [60 MO | DAY | YR.]

7. ENGINEERING DESIGN PREPARED BY LICENSED PROFESSIONAL ENGINEER (6 COPIES)

ATTACHED [66] UPDATED DESIGN [66] PREV. SUBMITTED [66] DATE [67 MO | DAY | YR.]

F

8. A. PARTNERS OR OFFICERS OF CORPORATION, GOVERNMENTAL BODY OR PUBLIC AUTHORITIES.

[13] LAST NAME [31] FIRST NAME [43] [44] TITLE

G

[13] [31] [43] [44]

H

[13] [31] [43] [44]

I

[13] [31] [43] [44]

J

B. CORPORATION DATA

REGISTERED IN - [12 STATE] [18] COUNTY DATE REG. [25 MO | DAY | YR.]

[31] AGENT - LAST NAME [49] FIRST NAME [61]

K

[13] AGENT STREET ADDRESS

[28] AGENT - CITY [51 STATE] [54] ZIP CODE AGENT TELEPHONE NO. [59 AREA] [62] [65 NUMBER]

L

9. NATURE OF OPERATION (CHECK ALL APPLICABLE ITEMS)

[13] ☐ SANITARY LANDFILL

[14] ☐ INCINERATOR

[15] ☐ COMPOSTING FACILITY

[16] ☐ CHEMICAL PROCESSING & TREATMENT

[17] ☐ RESOURCE RECOVERY

[18] ☐ TRANSFER STATION

[19] ☐ OTHER (EXPLAIN)

APPENDIX A

PAGE

ENTER FEID OR SSN HERE [ ]

10. MATERIAL FOR DISPOSAL:

REQUESTED:

		FOR OFFICE USE ONLY APPROVED
(a) SOLIDS:		
20[ ]	MUNICIPAL (HOUSEHOLD, COMMERCIAL, INSTITUTIONAL)	21[ ]
22[ ]	DRY SEWAGE SLUDGE	23[ ]
24[ ]	BULKY WASTES	25[ ]
26[ ]	CONSTRUCTION AND DEMOLITION	27[ ]
28[ ]	PESTICIDES - DRY	29[ ]
30[ ]	PESTICIDE CONTAINERS	31[ ]
32[ ]	HAZARDOUS WASTES - DRY	33[ ]
34[ ]	CHEMICAL WASTES - DRY	35[ ]
36[ ]	JUNKED AUTOS	37[ ]
38[ ]	TIRES	39[ ]
40[ ]	DEAD ANIMALS	41[ ]
42[ ]	LEAVES AND CHOPPED TREE WASTES	43[ ]
44[ ]	AGRICULTURE AND FOOD PROCESSING WASTES	45[ ]
46[ ]	TREE STUMPS	47[ ]
48[ ]	OIL SPILL CLEAN-UP WASTES	49[ ]
(b) LIQUIDS:		
50[ ]	WASTE OIL	51[ ]
52[ ]	BULK LIQUIDS AND SEMI-LIQUIDS	53[ ]
54[ ]	SEWAGE: SEPTIC OR OTHER FECAL LIQUIDS	55[ ]
56[ ]	PESTICIDE LIQUIDS	57[ ]
58[ ]	HAZARDOUS WASTE LIQUIDS	59[ ]
60[ ]	CHEMICAL WASTE LIQUIDS	61[ ]

11. OPERATIONAL DATA

A. INDICATE ACTUAL INCLUSIVE DATES USED IN REPORTING THIS DATA.

PERIOD FROM [13 MO | DAY | YR.] (12 MONTHS) PERIOD TO [19 MO | DAY | YR.]

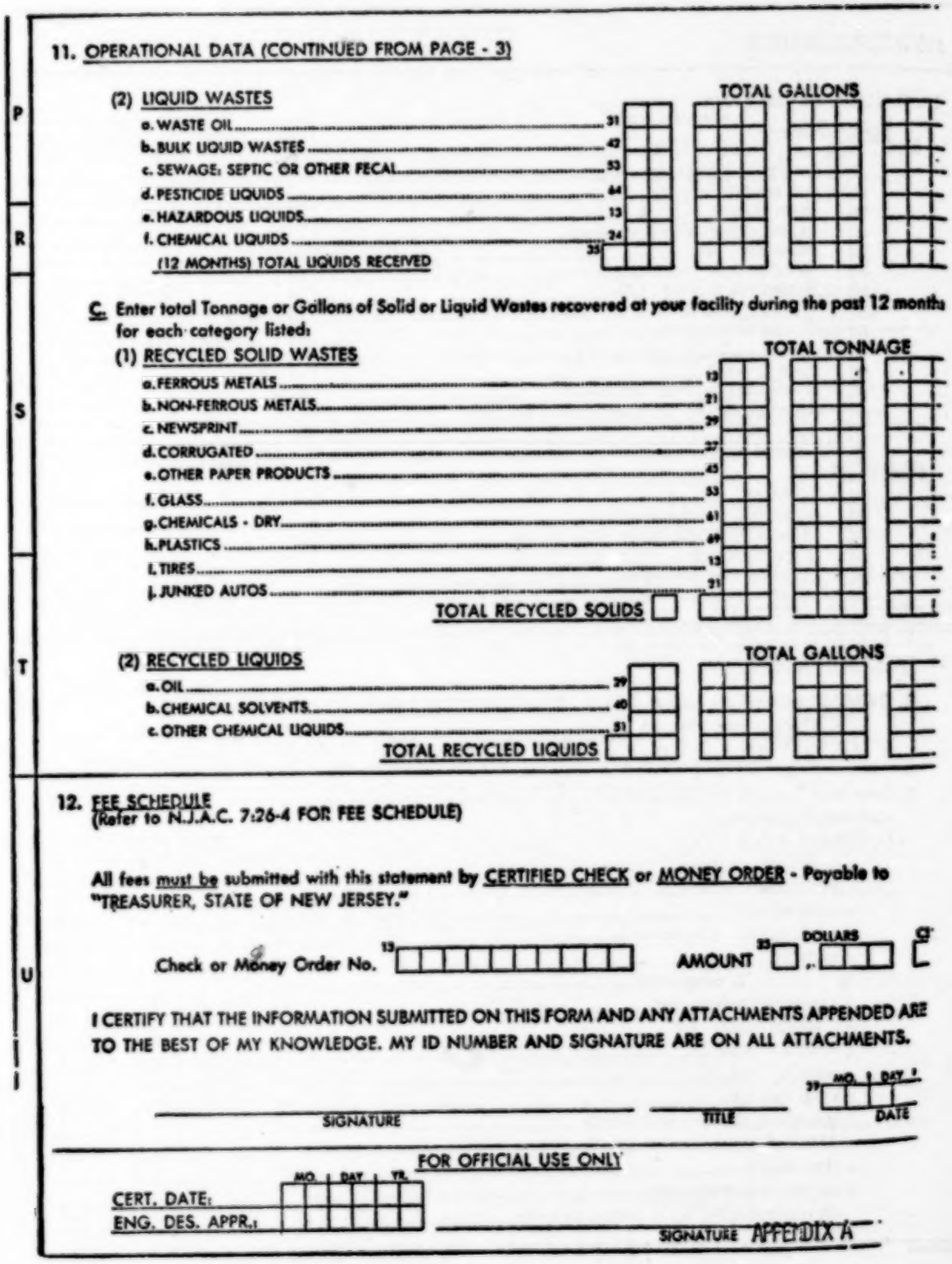
B. Enter total Tonnage or Gallons of Solid and Liquid wastes received at your facility for the Past 12 MONTHS for each category listed:

(1) SOLID WASTES

		TOTAL TONNAGE
a.	MUNICIPAL (HOUSEHOLD, COMMERCIAL, INDUSTRIAL) [25]	a
b.	DRY SEWAGE SLUDGE [33]	b
c.	BULKY WASTES [41]	c
d.	CONSTRUCTION & DEMOLITION [49]	d
e.	PESTICIDES - 1. DRY [57]	e
f.	2. CONTAINERS [65]	f
g.	HAZARDOUS WASTE - DRY [13]	g
h.	CHEMICAL WASTE - DRY [21]	h
i.	JUNKED AUTOS [29]	i
j.	TIRES [37]	j
k.	DEAD ANIMALS [45]	k
l.	LEAVES AND CHOPPED TREE WASTES [53]	l
m.	AGRICULTURE AND FOOD PROCESSING WASTE [61]	m
n.	TREE STUMPS [69]	n
o.	OIL SPILL CLEAN-UP WASTE [13]	o
	(12 MONTHS) TOTAL SOLID WASTES RECEIVED [31]	

PAGE - 3

APPENDIX A



Appendix B. Page 1.

Special Instructions for Completing Items 4, 11 and 12 of Registration Statement for a Solid Waste Facility

A. For Public Utility Commission Certificate Number (Item 4A) in excess of four digits use only the last four digits and place an asterisk (*) to the right of the blocks.

B. Fees (Item 12) annually with submission of updated registration statement = $500.00

submission of engineering designs = 500.00

transfer of registration = 50.00

C. To calculate tonnage of solid waste *received* (Item 11B) (conversion from cubic yards)

1. Municipal Waste (Household, Commercial, Institutional)

in non-compacting vehicles—multiply cubic yards by 0.12

in compactor trucks of 20 c. y. capacity or less—multiply cubic yards by 0.25

in compactor trucks of between 21 and 25 c. y. capacity—multiply cubic yards by 0.35

in compactor trucks of more than 25 c. y. capacity—multiply cubic yards by 0.40

2. Construction, Demolition, Bulky Items, Whole Tires, Leaves and Chopped Tree Wastes, Tree Stumps, Agriculture and Food Processing Wastes, Dead Animals and Shredded Tires—Multiply cubic yards by 0.20

3. Pesticides (dry), Hazardous Wastes (dry), Chemical Wastes (dry)—Multiply cubic yards by 2.0

4. Oil Spill Clean-up Wastes—Multiply cubic yards by 0.45

5. Dry Sewage Sludge and Pesticide Containers—Multiply cubic yards by 0.15

6. Junked Autos 2.0 tons per car regardless of cubic yards.

D. To calculate remaining life of facility (Item 4B) in years and tons (NOTE: applicable only to sanitary landfills).

1. Convert tonnage received to total in-place volumes (cubic yards) by multiplying the annual tonnage received for each category by the following factors and then finding the sum:

Category	*Factor*
Municipal (household, commercial, industrial)	(2.0)
Dry sewage sludge	(1.8)
Bulky Wastes	(10.0)
Construction and demolition	(6.7)
Pesticides (dry)	(0.5)
(containers)	(1.8)
Hazardous wastes (dry)	(0.5)
Chemical wastes (dry)	(0.5)
Junked autos	(•)
Tires—rubber (shredded)	(1.2)
(whole)	(10.0)

Appendix B. Page 2.

Category (continued)	*Factor*
Dead animals	(1.2)
Leaves and chopped tree wastes	(10.0)
Agriculture and food processing waste	(1.2)
Tree Stumps	(5.0)
Oil spill clean-up waste	(2.5)

• Each car three (3) cubic yards

2. Life remaining in years:

$$\text{Years} = \frac{1613\ A\ (H-C)}{y} \times 0.85$$ where:

Years = remaining life of facility in years
1613 = conversion factor
A = number of acres remaining to be filled •
H = overall height of remaining lifts in feet
C = total thickness of cover material in feet
y = sum of in-place volume (in cubic yards) received annually
0.85 = correction factor (allowing for required boundaries and side slopes)

• If a partial lift remains to be filled, calculate this fraction separately—then combine.

3. Life remaining in tons:

Tons = Years x Sum of the annual tons received

NEW JERSEY STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF SOLID WASTE MANAGEMENT
P.O. BOX 2807 TRENTON, N.J. 08625

REGISTRATION STATEMENT FOR A SOLID/LIQUID WASTE COLLECTOR OR HAULER

PRINT OR TYPE ONLY

INCOMPLETE OR IMPROPERLY PREPARED APPLICATIONS WILL BE RETURNED.

—COMPLETE BOTH SIDES OF FORM—

1. If the above name and address of registrant is incorrect or missing enter only the corrected information where indicated. Use SSN ONLY if you do not, have a FEID.

1

FEDERAL EMPLOYER ID NO. F ____ FEID —OR— SOCIAL SECURITY NUMBER SSN S ____ - ____ - ____

APPLICANTS NAME - LAST ____ FIRST ____ I ____ TITLE ____

COMPANY OR TRADE NAME ____

2

STREET ADDRESS ____

CITY ____ STATE ____ ZIP CODE ____ AREA ____ TELEPHONE NUMBER ____

2. ☐ NEW STATEMENT ☐ UPDATED STATEMENT REGISTRATION NO. ____

3. TYPE ORGANIZATION (Check only one) (COL. 13)

1 ☐ PROPRIETOR	2 ☐ PARTNERSHIP	3 ☐ INCORPORATED	4 ☐ MUNICIPALITY
5 ☐ COUNTY	6 ☐ UNIT STATE GOV.	7 ☐ AUTHORITY	8 ☐ HOMEOWNER
9 ☐ OTHERS HAULING OWN WASTE			

4. TYPE OF WASTE (Check all applicable areas) (COLS. 14-21)

(14) 1 ☐ MUNICIPAL (HOME, COMM, INSTITU.)	(15) 5 ☐ SEPTIC TANK WASTE
(16) 2 ☐ DRY CHEMICAL (INCL HAZARDOUS)	(17) 6 ☐ SEWAGE PLANT SLUDGE
(18) 3 ☐ CONSTRUCTION & DEMOLITION	(19) 7 ☐ LIQUID CHEMICAL (INCL. HAZARDOUS)
(20) 4 ☐ TREE & YARD WASTE	(21) 8 ☐ INDUSTRIAL & OTHER

3

5. PUC LICENSED? ☐ NO ☐ YES PUC CERTIFICATE NUMBER ____

6. FEES MUST BE SUBMITTED BY CERTIFIED CHECK OR MONEY ORDER-PAYABLE TO "TREASURER, STATE OF NEW JERSEY" REFER TO N.J.A.C. 7:26-4 FOR FEE SCHEDULE.

CHECK OR MONEY ORDER NO. ____ AMOUNT ____ .00

I CERTIFY THAT THE INFORMATION SUBMITTED ON BOTH SIDES OF THIS FORM AND ANY ATTACHMENTS APPENDED ARE TRUE TO THE BEST OF MY KNOWLEDGE. MY ID NUMBER AND SIGNATURE ARE ON ALL ATTACHMENTS.

SIGNATURE _____ TITLE _____ DATE MO. DAY YR. ____

OFFICIAL USE ONLY - Date Approved MO. DAY YR. ____ SIGNATURE _____

APPENDIX C PAGE 1

4

8A. PARTNERS OR OFFICERS OF CORP., GOVERNMENTAL BODY OR PUBLIC AUTHORITIES

LAST NAME ____ FIRST NAME ____ I ____ TITLE ____

LAST NAME ____ FIRST NAME ____ I ____ TITLE ____

LAST NAME ____ FIRST NAME ____ I ____ TITLE ____

5

B. CORPORATION DATA

REGISTERED IN - STATE ____ COUNTY ____ DATE MO. DAY YR. ____

AGENT - LAST NAME ____ FIRST NAME ____ I ____

6

AGENT - STREET ADDRESS ____

AGENT - CITY ____ STATE ____ ZIP CODE ____ AREA ____ TELEPHONE NUMBER ____

7

9. LIST ALL VEHICLE LICENSE NUMBERS FOR WHICH YOU DESIRE AN APPROVED REGISTRATION. Indicate in the first box the state code (shown below) of the registered vehicle and the last six (6) characters of the license number. (If more space is needed attach a sheet with additional license numbers).

STATE CODES - (1) N.J. - (2) N.Y. - (3) PA. - (4) DEL. - (5) OTHER

(12) 1 STATE CODE ☐	LICENSE NUMBER ____	(20) 2 STATE CODE ☐	LICENSE NUMBER ____
(27) 3 STATE CODE ☐	LICENSE NUMBER ____	(34) 4 ☐	____
(41) 5 ☐	____	(48) 6 ☐	____
(55) 7 ☐	____	(62) 8 ☐	____
(69) 9 ☐	____		

Check here if additional list is attached ☐ TOTAL VEHICLES (INCLUDING ADDITIONAL LIST) ____

8

10. OPERATIONAL DATA

Indicate actual inclusive dates used in reporting this data (12 month period).

PERIOD FROM MO. DAY YR. ____ PERIOD TO MO. DAY YR. ____

9 (1)

*WASTE CODE ____ ORIGIN-MUNICIPALITY (CITY) ____ ORIGIN-COUNTY ____

TONS OR GALLONS (IN 1,000'S) ____ DISPOSAL-MUNICIPALITY (CITY) ____ DISPOSAL-COUNTY ____

9 (2)

*WASTE CODE ____ ORIGIN-MUNICIPALITY (CITY) ____ ORIGIN-COUNTY ____

TONS OR GALLONS (IN 1,000'S) ____ DISPOSAL-MUNICIPALITY (CITY) ____ DISPOSAL-COUNTY ____

9 (3)

*WASTE CODE ____ ORIGIN-MUNICIPALITY (CITY) ____ ORIGIN-COUNTY ____

TONS OR GALLONS (IN 1,000'S) ____ DISPOSAL-MUNICIPALITY (CITY) ____ DISPOSAL-COUNTY ____

NOTE - REFER TO ITEM 4 FOR WASTE CODES

IF ADDITIONAL SPACE IS REQUIRED FOR OPERATIONAL DATA ATTACH A SHEET(S) WITH DATA AND CHECK THIS BLOCK ☐

APPENDIX C PAGE 2

Appendix D.

Special Instructions for Completing Items 5, 6 and 10 of Registration Statement for a Solid/Liquid Waste Collector or Hauler

A. PRIVATE AUTOMOBILES AND STATION WAGONS NEED *NOT* REGISTER.

B. In order to properly complete Item 10 of the *Registration Statement for a Solid/Liquid Waste Collector or Hauler,* it may be necessary to convert cubic yards of waste to tons where the actual weight of the wastes collected have not been determined through the use of scales. To convert from cubic yards to tons, simply multiply the volume (in yards) by the appropriate factor listed below.

1. *For Municipal-Type Wastes (Household, Commercial, Institutional):*

   in Non-Compacting Vehicles: Multiply cubic yards by 0.12

   in Compactor Trucks up to 20 c.y. capacity: Multiply cubic yards by 0.25

   in Compactor Trucks with capacity between 21 and 25 c.y.: Multiply cubic yards by 0.35

   in Compactor Trucks with capacity over 25 c.y.: Multiply cubic yards by 0.40

2. *For Construction, Demolition, Yard Wastes, and Other Bulky Wastes:*

   Multiply cubic yards by 0.20

3. *For Dry Chemicals (liquids should be entered as gallons):*

   Multiply cubic yards by 2.0

C. For *out-of-state wastes only* (Item 10), enter the name of the state (New York-Penna.-Delaware-Other) in blocks marked County.

D. For Public Utility Commission Certificate Number Item 5) in excess of four digits, use only the last four digits and place an asterisk (•) to the right of the blocks.

E. Fees (Item 6) Annually:

1st vehicle (each registrant) = $45.00

each additional vehicle (same registrant) = 5.00

F. Item 10—Report actual tons of solid materials and thousands of gallons for liquid materials.

EXAMPLE:

22 cubic yard compactor, 5 loads per day municipal waste, 6 days per week, 52 weeks per year (for this example use factor of 0.35)

22	x	5	x	6	x	52	x	0.35	=	12012
cubic yards per load		loads per day		days per week		weeks per year		factor for vehicle and type of waste		Tons per year

Return application No LATER THAN JUNE 15, 1974

ORAL OPINION.

SUPERIOR COURT OF NEW JERSEY.
LAW DIVISION—MERCER COUNTY.

DOCKET NO. L-15068-73 P. W.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF GLEN COVE, A MUNICIPAL CORPORATION OF THE STATE OF NEW YORK, LANDFILL & DEVELOPMENT CO., A N. J. CORPORATION, MacSANITARY LANDFILL, INC., A N. J. CORPORATION, KINSLEY'S LANDFILL, INC., A N. J. CORPORATION, AND DE-LORENZO-INTERSTATE WASTE REMOVAL COMPANY, A N. J. CORPORATION, JOHN P. FAZZIO, INC., T/A JOHN P. FAZZIO LANDFILL COMPANY, AND CONTINENTAL VANGUARD, A N. J. CORPORATION,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Defendants.

Before:

HONORABLE GEORGE Y. SCHOCH, J.S.C.

Place:

Mercer County Courthouse,
Trenton, New Jersey.

March 25, 1974.

Appearances:

JAMIESON, WALSH, McCARDELL, MOORE & PESKIN, by MR. HERBERT F. MOORE, and ARTHUR MEISEL, appearing on behalf of the plaintiffs, attorneys.

MR. VINCENT J. DOTOLI, appearing on behalf of defendant Fazzio, attorney.

WILLIAM F. HYLAND, Attorney General of the State of New Jersey, by MR. MARK L. FIRST, Deputy Attorney General, appearing on behalf of the defendant-State of New Jersey.

THE COURT: Well, there are three separate points raised by the motions or, I should say, by the motion and countermotion presented here. Each side makes this argument for summary judgment conceding that as to these particular issues there are no material issues of fact involved and so that the issues before the court at the moment are ripe for summary judgment.

The New Jersey Legislature passed a law, Public Law 1973, Chapter 363, which says in part, "No person shall bring into this state any solid or liquid waste which originated or was collected outside the territorial limits of the state, except garbage to be fed to swine in the State of New Jersey, until the Commissioner shall determine such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this state."

There were emergency regulations promulgated by the Commissioner, N. J. A. C. 7:1-4.1 and N. J. A. C. 7:1-4.2. The second regulation sets forth certain exceptions, descriptions of exceptions to the prohibition of solid or liquid waste, including separated waste material that is

intended for re-cycling and certain other exceptions which are immaterial to the issue at hand.

Obviously the first matter that must be decided is whether the item of solid or liquid waste, we have been calling it garbage but it obviously includes more than just garbage, whether that item is a proper subject of interstate commerce. If it is not then there would be no prohibition against the state passing a law that prohibits the passage or importation of such item either through or into the state, since it would not violate the interstate commerce clause of the United States Constitution.

With reference to that point my attention has been called to two cases. One is the case of *Barnett v. A-1 Scavenger Service Co., Inc.*, a Missouri Court of Appeals case (1971) reported at 466 Southwestern 2d at 150. That case involved an interpretation of the Fair Labor Standards Act. A helper on a refuse truck who worked for an employer engaged exclusively in the collection and disposal of garbage and waste in the City of St. Louis, whether or not he was subject to the Fair Labor Standards provisions regarding minimum wage and overtime, because the employer collected waste from companies engaged in interstate commerce. At page 156 the court said, and I quote, "In the instant case it can scarcely be plausibly argued that the garbage and refuse after being collected by plaintiff entered the channels of interstate commerce, or the mere transportation of such garbage and other refuse for the purpose of disposing of it could be said to be commerce among the several states within the meaning of the Fair Labor Standards Act."

So we have the authority of that case which indicates that the transportation of trash and waste across the state line is not engaging in interstate commerce. On the other hand, there is a case of *U. S. v. Pennsylvania Refuse Removal Association*, at 242 Federal Supplement 794, U. S. District Court case for the Eastern District of Pennsylvania (1965) where the court said at page 799, "Defendants argue at various points in their brief that because trash itself is by definition a worthless commodity, it cannot be the subject of 'trade or commerce' as those terms are used in the Sherman Act. That argument misses the point. Here, the relevant subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the words 'trade or commerce' as used in the Act, the defendant's position has no merit." And on appeal to the U. S. 3rd Circuit Court reported at 357 Federal 2d, 806 (1966), the 3d Circuit Court said at page 808, "From the record we are satisfied that the factual holding of the trial judge that 'the hauling and disposing of refuse was an integral part of the refuse removal business' is entirely correct. In that situation the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state is a vital element of the one business operation which plainly is a proper subject of interstate commerce."

Then there is a citation of *Hoke v. U. S.*

Then we have the case of *U. S. v. Bishop Processing Company*, U. S. District Court, District of Maryland (1968) 287 Federal Supplement 624, which I think could be analogized to our case. In the Bishop case the question was whether a business or factory that polluted the air and that air pollution, malodorous pollution obviously affected business conditions and property values in the neighboring state when the wind blew the smell and pollutants across the state line. One of the questions that had to be decided was whether the Clean Air Act covered this activity, that is, whether or not movement of the air pollutants across state lines constituted interstate commerce.

And the District Court in Maryland decided, at page 629, that it did, saying, "The movement of pollutants across a state line is proper jurisdictional basis for the provisions of the Act relating to the abatement of interstate air pollution. Such movement of pollutants across state lines constitutes interstate commerce subject to the power granted the Congress by the Constitution to regulate such commerce."

From my analysis of the cases that I have just cited I think that the proper viewpoint to accept is that of the 3d Circuit that the transportation of waste across the state line is a subject of interstate commerce and, therefore, subject to the controls of Congress in accordance with the interstate commerce laws. However, that is not dispositive of the problem. The plaintiff suggested the second point that the Federal Government has pre-empted this field, and when I say this field I mean the field of prohibition of interstate movement of solid waste for either treatment or disposal.

I prefer to decide the problem on the basis of discrimination rather than on the theory of pre-emption because I think the issue is more clearly defined when we consider discrimination. I have already read certain portions of the federal code. I will refer to them again. 42 U. S. C. A. 3254. Let me read this in full. "The secretary shall encourage cooperative activities by the states and local governments in connection with solid waste disposal programs; encourage, where practicable, interstate, interlocal and regional planning for, and the conduct of, interstate, interlocal and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal."

In Section 3251 there are five parts to subsection (b) setting forth the purposes of this particular law, all of

which talk about assistance, technical advice, training grants, et cetera. None of which seems to me indicate the type of pre-emption that I feel would be required in order to find the Federal Government has pre-empted this field in the fashion that the plaintiffs suggest and to arrive at the decision the plaintiffs suggest.

So we come to the question of whether or not this statute passed by the Legislature of New Jersey which, as I have already indicated, I find involves material which is the subject of interstate commerce, whether the statute discriminates against interstate commerce to the extent that it should be declared unconstitutional. I immediately concede that I am aware of the cases which hold that there is a strong presumption that the statute is constitutional and the legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. Further, to declare a statute unconstitutional is a judicial power to be delicately exercised, quoting from *Harvey v. Essex County Board of Freeholders*, 30 N. J. 381. The Court in the case of *Supermarket General v. Sills*, 93 N. J. Superior, 326 (Chancery Div. 1966) cites a quotation from the U. S. Supreme Court case of *Head v. New Mexico Board of Examiners* at page 345. The New Jersey Court says, "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. State regulation based on the police power which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand."

As Judge Schreiber said in the case of *Hackensack Meadows Development v. Municipal Sanitary Landfill Authority*, a Chancery Division slip opinion dated February 13, 1974, page 12 of that slip opinion, "State regulations and laws based on the exercise of the police power

may only stand if they do not discriminate against interstate commerce."

I am aware of the long line of cases that deal with the transportation of deleterious substances. They are listed in *Baldwin v. Seelig*, 294 U. S. 511 (1934), opinion of Mr. Justice Cardozo, at page 525, 7 Lawyers Ed., 1039, which recites some of the cases which have upheld the statutes regulating the importation of unhealthy cattle, decayed foods. Mr. Justice Cardozo says, "Things such as these are not proper subjects of commerce (and notes) there is no unreasonable interference when they are inspected and excluded."

I think the situation is different in this case before me and I see a relationship between the natural gas cases and this case. Some may say it's a strained reason but the natural gas cases that I refer to are *Pennsylvania v. West Virginia*, 262 U. S. 553, and *West v. Kansas Natural Gas Company*, 221 U. S. 229. Each of those cases, the so-called home state attempted to prevent the exportation of one of its natural resources and the statutes were struck down as unconstitutional in derogation of the free flow of commerce, that it is Congress' prerogative to control and not the state.

If we consider, as I do, that the purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste that is presented to the various disposal companies, the natural resources, the land, the availability of the land will be prolonged or extended or used less quickly. I don't see any difference between a state being prevented from prohibiting exportation of natural gas than the state being prevented from prohibiting the importation of something that will in effect use one of the state's natural resources.

Therefore, I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional.

You will prepare an order, Mr. Moore?

MR. MOORE: Yes, sir.

(End)

COURT REPORTERS CERTIFICATION.

I, ANTHONY DI STEFANO, one of the Official Court Reporters of the Superior and County Courts of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken by me in the above entitled matter.

ANTHONY DI STEFANO
Anthony Di Stefano

Dated: March 28, 1974.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc., et al.
Plaintiffs,

v.

STATE OF NEW JERSEY, etc., et al.
Defendants.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, attorneys for plaintiffs, by Herbert F. Moore, Esq., on a Notice of Motion for Summary Judgment pursuant to R. 4:46 of the Rules governing this Court, in the presence of the office of the Attorney General of the State of New Jersey, attorney for defendants, Mark L. First, Esq., appearing;

And the Court having heard the argument of the attorneys for the respective parties and being of the opinion that the pleadings, together with the affidavits and briefs submitted in support of and in opposition to plaintiffs' motion show palpably that there is no genuine issue as to any material fact challenged and that the plaintiffs have a right to summary judgment declaring P. L. 1973, c. 363 invalid as constituting an unconstitutional discrimination on interstate commerce;

It is on this 26th day of March, 1974,

ORDERED, and declared that P. L. 1973, c. 363 constitutes an unconstitutional discrimination against interstate commerce and is invalid in its entirety.

GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

Consent as to form of the within judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

DEFENDANTS' NOTICE OF APPEAL.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY

DOCKET No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

To: CLERK OF THE COURT
HONORABLE GEORGE Y. SCHOCH
Judge, Superior Court of New Jersey
Mercer County Court House
Trenton, New Jersey 08607

HERBERT F. MOORE, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
One West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Interstate 287 and McKinley Street
South Plainfield, New Jersey 07080

SIRS:

NOTICE IS HEREBY GIVEN that all defendants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey, appeal to the Superior Court

of New Jersey, Appellate Division, from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring P. L. 1973, c. 363 unconstitutional as violative of Article I, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

BY: MARK L. FIRST
Mark L. First
Deputy Attorney General

DATED: April 19, 1974

I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

MOTION FOR STAY PENDING APPEAL.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET No. A-2202-73

Civil Action

CITY OF PHILADELPHIA, etc., et als.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

TO: CLERK OF THE COURTS

ARTHUR MEISEL, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
Attorney for Plaintiffs-Appellants
1 West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Attorney for Plaintiffs-Intervenors-
Appellants
Interstate 287 and McKinley Street
South Plainfield, New Jersey

SIRS:

PLEASE TAKE NOTICE that the undersigned, attorney for defendants-appellants, hereby moves the Superior Court of New Jersey, Appellate Division, for an order staying the judgment entered by the Superior Court of New Jersey, Law Division, Mercer County (Schoch A. J. S. C.) on March 27, 1974.

In support of the within motion, the defendants-appellants will rely on the brief and affidavits submitted herewith and the brief and appendix submitted on July 9, 1974.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Deputy Attorney General

DATED: July 26, 1974

ORDER DENYING MOTION FOR STAY OF JUDGMENT.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2202-73
Motion No. M-1978-73
Before Part P

Judges: HANDLER, MEANOR, CRANE

CITY OF PHILADELPHIA, etc., et als

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als

v.

STATE OF NEW JERSEY, et al.

Moving Papers Filed:	July 26, 1974
Answering Papers Filed:	August 8 & 9, 1974
Date Submitted to Court:	August 12, 1974
Date Argued:	
Date Decided:	August 14, 1974

This matter having been duly presented to the Court, it is hereby ordered as follows:

	GRANTED	DENIED	OTHER
MOTION FOR STAY		X	X

SUPPLEMENTAL:

The appeal shall be accelerated.

FOR THE COURT:

ALAN B. HANDLER
P. J. A. D.

I hereby certify that the foregoing is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Clerk

WITNESS, THE HONORABLE ALAN B. HANDLER, PRESIDING JUDGE OF PART P, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, this 14th day of August, 1974.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

EXCERPTS FROM BRIEF OF APPELLANTS, STATE OF NEW JERSEY, FILED IN THE APPELLATE DIVISION.

(Pages 17-18.)

[17]

• • •

Similarly, the State of New Jersey does not recognize solid waste for disposal as a legitimate item of commerce. As did Indiana with dead horses, New Jersey only allows solid waste to be handled by those who are licensed and regulated under the concurrent jurisdiction of the Public Utilities Commission and the Department of Environmental Protection. N. J. S. A. 48:2-13; N. J. S. A. 48:13A-1, et seq.; N. J. S. A. 13:1E-1, et seq. The license and regulatory scheme is broad and pervasive and is designed to insure that the public health and environment are properly protected against this deleterious

[18]

substance. Surely, the above statutes clearly demonstrate that the State of New Jersey has not recognized waste as a legitimate item of commerce. Thus, P. L. 1973, C. 363 is consistent with, and not repugnant to, the rationale of the "natural gas" cases.

• • •

CERTIFICATION OF APPEAL BY NEW JERSEY SUPREME COURT.

SUPREME COURT OF NEW JERSEY
#10927 September Term 1974

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause on March 25, 1974 in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-2202-73), be certified directly to this Court for review by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers to be filed by the parties in the prosecution of this appeal shall be filed by the Clerk of this Court without payment of fees for such filing; and it is further

ORDERED that this matter be consolidated with Hackensack Meadowlands Development Commission and State of New Jersey v. Municipal Sanitary Landfill Authority, et al and City of Yonkers, New York (A-1592-73).

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton on this 7th day of October, 1974.

FLORENCE R. PESKOE
Clerk

OPINION OF NEW JERSEY SUPREME COURT.

[68 *N. J.* 451 (1975)]

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[451]

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and State of New Jersey Department of Environmental Protection, Plaintiffs-Appellants,

v.

MUNICIPAL SANITARY LANDFILL AUTHORITY et al., Defendants-Respondents,

and

City of Yonkers, New York
Defendant-Intervenor-Respondent

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al., Plaintiffs-Intervenors-Respondents,

v.

STATE of New Jersey et al., Defendants-Appellants.

Supreme Court of New Jersey.
Argued Dec. 2, 1974.
Decided Nov. 18, 1975.

• • •

[455]

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for defendants-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

Mr. Herbert F. Moore argued the cause for plaintiffs-respondents, City of Philadelphia, etc., et al (*Messrs. Jamieson, Walsh, McCardell, Moore and Peskin,* attorneys; *Mr. Moore,* of counsel; *Mr. Arthur Meisel,* on the brief).

Mr. Vincent J. Dotoli argued the cause for plaintiffs-intervenors-respondents, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co., et al.

Mr. David Samson argued the cause for defendants-respondents, Municipal Sanitary Landfill Authority, etc. (*Messrs. Leib, Wolff and Samson,* attorneys).

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for plaintiffs-appellants (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney; *Mr. Skillman,* of counsel; *Mr. Mark L. First,* Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

MOUNTAIN, J.

These proceedings involve the joint review of two separate cases. In one case the judgment was entered pursuant to an opinion rendered in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority,* 127 N. J. Super. 160 (Ch. Div. 1974). In the other, judgment was entered following the rendition of an oral opinion in a suit brought by the City of Philadelphia, together with the owners of several landfill operations in South Jersey, against the State of New Jersey and its Department of Environmental Protection (DEP). The [456] cumulative effect of these two judgments was to render unconstitutional certain sections of the Waste Control Act, N. J. S. A. 13:11-1 *et seq.*, together with regulations promulgated by DEP and by the Hackensack Meadowlands Development Commission (HMDC). The measures declared unconstitutional had as their purpose the exclusion from this State of solid waste originating elsewhere. In each suit the trial court found that the laws and regulations under review violated the Commerce Clause, Article 1, § 8, clause 3, of the United States Constitution.

I

The comprehensive authority and responsibility delegated by the Legislature to the HMDC in the Hackensack Meadowlands Reclamation and Development Act, N. J. S. A. 13:17-1 *et seq.*, includes the power to provide facilities for the treatment and disposal of solid waste. N. J. S. A. 13:17-6(w), 13:17-10. The Waste Control Act, N. J. S. A. 13:1I-1 et seq., as originally enacted, contained a legislative finding "that the quality of New Jersey's environment is being threatened by the treatment and disposal of wastes generated or collected outside the State . . ." N. J. S. A. 13:1I-2. By amendments to this act that became effective early in 1974, the Legislature further found that the whole problem of solid waste disposal was growing increasingly acute and that it continued to be seriously exacerbated by the importation of waste from without the State; it determined to and did forbid that any further such waste be brought into the State.[1] The Waste Control Act also au-

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited. [N. J. S. A. 13:1I-9]

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of

thorized and directed [457] the DEP to promulgate rules and regulations "prohibiting . . . the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State." N. J. S. A. 13:1I-4. Both HMDC and DEP promulgated regulations responsive to these legislative enactments, all looking to bar the importation of solid and liquid waste from outside the State.[2]

1. (Cont'd.)
the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act." P. L. 1973, c. 39. [N. J. S. A. 13:1I-10]

2. The pertinent portions of the HMDC regulations, which became effective September 1, 1973, reads as follows:

> (g) No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> (h) All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission [Hackensack Meadowlands Development Commission] . . . a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment. [N. J. A. C. 19:7-1.1]

The regulation of the DEP in its present form became effective February 1, 1974 and reads as follows:

> (a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials

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In order to enforce these statutes and rules HMDC and DEP filed a complaint seeking permanently to enjoin Municipal Sanitary Landfill Authority (hereinafter MSLA)[3] from accepting for disposal at its landfill sites any solid waste originating or collected outside of the State's territorial borders.[4] At the same time, with the consent of the defendants, an order to show cause issued with temporary restraints prohibiting MSLA from accepting for disposal out-of-state waste. On the return day of the order to show cause, defendants answered, challenging the constitutionality of both the DEP and HMDC regulations as well as the statutes authorizing their promulgation. Thereafter the City of Yonkers, New York, was granted leave to intervene as a party defendant, as it was then using an MSLA site to dispose of its municipal refuse.

2. (Cont'd.)
and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
>
> 4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State. [N. J. A. C. 7:1-4.2]

An earlier DEP regulation was before the trial court in the *Hackensack Meadowlands* case and is set forth in the court's opinion. 127 N. J. Super. at 164, 316 A. 2d 711. It was expressly repealed at the same time that it was superseded by the regulation last above quoted. N. J. A. C. 7:26-1.5.

3. Municipal Sanitary Landfill Authority is a joint venture wholly owned and operated by other named defendants. Its landfill operations are located in the Town of Kearny, within the Hackensack Meadowlands District.

4. Plaintiffs also sought statutory penalties pursuant to N. J. S. A. 13:11-5.

No testimony was taken; the parties relied on affidavits and the transcript of previous [459] proceedings before the Hackensack Meadowlands Commission. In February, 1974, the trial judge filed a written opinion declaring the DEP and HMDC regulations to be in contravention of the Commerce Clause of the United States Constitution and therefore invalid. *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, supra,* 127 N. J. Super. 160 (Ch. Div. 1974). Judgment was temporarily stayed and on March 26, the Appellate Division granted plaintiffs' motion for a further stay pending determination of the appeal. Upon application by plaintiffs, this Court granted certification while the appeal was pending unheard in the Appellate Division, R. 2:12-2, 66 N. J. 337 (1974).

In January, 1974, in a separate plenary suit, the City of Philadelphia, together with other plaintiffs mentioned above, filed a complaint seeking a declaration that the Waste Control Act, as well as the regulations promulgated pursuant thereto, violated the Constitutions of both the United States and the State of New Jersey, and further seeking temporary and permanent injunctive relief restraining DEP from enforcing the statutory provisions and from adopting or enforcing regulations intended to be in furtherance of the statutory purpose. On March 25, 1974 the trial judge (not the judge who had heard the *Hackensack Meadowlands* case), on cross-motions for summary judgment, rendered an oral opinion declaring that N. J. S. A. 13:1I-9 and 10 effected an improper discrimination against interstate commerce and were hence unconstitutional. Following the filing of a notice of appeal to the Appellate Division, we again granted direct certification, 67 N. J. 102 (1974), and the two actions were brought on for argument and disposition before us at the same time.

We thus face an issue of major public importance, namely, whether the regulations and statutes under review, designed to meet a pressing emergency in the life of the State, are of [460] such a nature as to violate the Commerce Clause, Article I, § 8, clause 3, of the United States Constitution.[5]

II

The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached "crisis proportions" due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,* 64 N. J. 190, 193 (1974). The facts presented in the two cases now before this Court, together with the legislative concern with this problem to which we have alluded above and of which more will be said below, serve to reinforce very strongly our consciousness of this extremely serious situation.

The materials constituting the records on these appeals reveal that since the effective date of the creation of HMDC, July 1, 1968, three surveys have been conducted to determine the volume and origin of the solid waste disposed of in the landfills located within HMD. The first survey, mandated by N. J. S. A. 13:17-10(a), found that in 1968 approximately 30,000 tons of solid waste entered HMD each week, of which about 4,000 tons originated outside of New Jersey. The second survey, con-

5. We do not reach the question of the validity of the regulations and statutes when measured against the Privileges and Immunities Clause, Article IV, § 2 of the United States Constitution. The argument for invalidity was found to be totally without merit in the HMDC case, 127 N. J. Super. at 168-69, 316 A. 2d 711, and has not been briefed before us by the parties in either of the two suits.

ducted in 1971, indicated that the total volume of solid waste disposed of in the District had risen to 42,000 tons per week, 5,000 tons of which originated outside of the State. The latest survey, conducted in 1973, revealed further increases to total weekly deposits of 55,000 tons of [461] solid waste, of which about 10,000 tons came from out of state.[6]

On the basis of the 1973 survey, it was estimated by HMDC that the existing landfill sites within HMD had a useful life of about three years, but that a ban on out-of-state refuse would extend their availability by approximately six months. Since the adoption of the ban on out-of-state dumping, the HMDC revised its estimates of the remaining life of the landfills within the HMD. It was calculated that as of January 1, 1974, sanitary landfills within that area had a total life expectancy of about 38 months if the ban were to be continued, but an availability of only 26 months if the ban were to be lifted. Furthermore, there is little chance of reducing the volume of garbage being dumped in the HMD which originates within the State, for the reason, among others, that the Commission has become obligated by statute, N. J. S. A. 13:17-10, to provide solid waste disposal facilities for over 100 New Jersey municipalities.

State-wide, the picture appears much the same. It was estimated that in 1971 over 40,000 tons of solid waste originating out of state was being buried each week in the 340 sanitary landfills then existing within the State. DEP estimated that in that year 1.5 million tons of solid waste originating outside of the State was buried in New Jersey. DEP has also recently computed the total life of the existing sanitary landfill facilities to be about three years in northern New Jersey and approximately ten years in the

6. It was determined that about 6,700 of the 10,000 tons were being disposed of in the three MSLA sites.

southern part of the State. It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%, with the increase in some specific landfills being as high as 50 to 100%.

Compounding the shortage problem are other extremely important environmental considerations. Many existing land- [462] fills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

To obtain a more comprehensive picture of the problem now facing this State, we have taken judicial notice of another report, released in 1972, which has further documented the crisis in this area.[7] According to this report, in 1972 almost 95% of New Jersey's solid waste was disposed of in landfills within the State. Further projections indicate that with the existing landfill acreage and the projected rate of dumping, all land that is presently committed to landfill operations will be exhausted by 1982. Also recognized is the strong probability that other environmental considerations may further limit the use for landfill purposes of much of the existing allocated acreage. Moreover, the HMD is singled out as an area where "[a] critical test of creative solid waste management is now taking place . . . ." The report estimated that by the end of 1975, the supply of acreage available for landfill in the

7. State of New Jersey County and Municipal Government Study Commission, Solid Waste: A Coordinated Approach (1972).

Meadowlands would be exhausted, an estimate very similar to those made by the HMDC and noted earlier in this opinion.

We are also aware that very little has yet been done in any really effective way—on either a national or an interstate level to achieve a satisfactory solution to this pressing problem. The scope of federal legislation is thus far quite limited. The Solid Waste Disposal Act, 42 U. S. C. A. § 3251 *et seq.*, originally provided only for "financial and technical [463] assistance and leadership . . ." to develop new methods to reduce the volume of waste and to provide for economical methods of disposal, 42 U. S. C. A. § 3251(a)(6). The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act to provide financial assistance for the construction of solid waste disposal facilities and to furnish technical and financial assistance to promote and develop new methods of resource recovery. See, *e.g.*, 42 U. S. C. A. §§ 3251(b)(1), 3254b. Although the Act as it now reads also provides for the encouragement of interstate cooperation to resolve the waste disposal problem, 42 U. S. C. A. §§ 3254, 3254a, nothing has been brought to our attention to indicate that New Jersey has entered into any agreement with her neighboring states of New York and Pennsylvania looking to this end.[8]

8. In 1970, the Tri-State Transportation Commission [Connecticut, New York, and New Jersey] published a report entitled *Managing the Natural Environment—A Regional Plan for Water, Sewage, Air and Refuse*. The Commission, interestingly, foresaw the problem with which we are now faced, in its recognition that an interstate solution to the solid waste problem might be difficult to achieve because of increasing resistance to waste "imports." The Commission, therefore, recommended the continued use of landfill sites wherever possible along with regional development of large, efficient incinerators for the cities and inner suburbs. *Id.* at 32. To date, however, the Commission has been ineffective in bringing about the implementation of any of these suggestions.

At the State level there has been more significant activity. In 1970 the Bureau of Solid Waste Management of DEP published the *New Jersey State Solid Waste Management Plan*, which, among other proposals, recommended the creation of "Solid Waste Management Districts."[9] The *Solid Waste Management Plan* has been approved by the Federal Environmental Protection Agency as the official State plan for New Jersey.

Before the release of the *New Jersey Plan* in 1970, the Legislature had enacted the "Incinerator Authorities Law," [464] N. J. S. A. 40:66A-1 *et seq.*, delegating to municipalities the authority to provide solid waste collection and disposal facilities on a local basis. Prior thereto, in 1968, the "Solid Waste Management Authorities Law" had been enacted, N. J. S. A. 40:66A-32 *et seq.*, permitting the governing bodies of one or more municipalities to create solid waste management authorities to construct and operate incinerators and other solid waste treatment facilities. 1970, the year DEP released its *New Jersey Plan*, saw three further related enactments by the Legislature. The "Solid Waste Utility Control Act," N. J. S. A. 48:13A-1 *et seq.*, recognizing the need for state-wide control over the solid waste industry, provided that the Board of Public Utility Commissioners assume the duties of "regulating [the] economic aspects of solid waste collection, disposal and utilization service . . . ." N. J. S. A. 48:13A-2. The "County Solid Waste Disposal Financing Law," N. J. S. A. 40:66A-31.1, *et seq.*, took note of the fact that the cost of constructing disposal facilities would be prohibitive for many municipalities, and delegated to counties the authority to

9. The Plan recommended either a "maximum sanitary landfill strategy" or a "maximum incineration strategy," depending on the availability of sanitary landfill acreage.

purchase or construct such facilities within the county "either alone or jointly with any municipality." N. J. S. A. 40:66A-31.4(1). Finally, the "Solid Waste Management Act," N. J. S. A. 13:1E-1 et seq., provided DEP with the authority to "supervise solid waste collection and disposal facilities or operations," and to plan all future facilities having in mind that they should conform to "reasonably contemplated development of comprehensive community or regional solid waste collection and disposal facilities and operations and to any State-wide, regional, county and intercounty plans for solid waste management," N. J. S. A. 13:1E-4. These statutes are in addition to the Hackensack Meadowlands Reclamation and Development Act and the Waste Control Act that are earlier discussed above.

Supplementing these statutory provisions, the HMDC has recently announced blueprints to phase out all dumping [465] in the Meadowlands by 1979. It is currently planning to construct a baling plant to compact waste into solid, nonflammable building blocks that may then be used as the base of a 2,000 acre meadowlands park located upon existing landfill sites. Also projected is a resource-recovery plant.

Assuming that plans such as these formulated by the HMDC are implemented within the proposed time period, it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. Increasing the lifespan of the HMDC landfills would also alleviate future pressure on other landfills located throughout the State, to accept waste now handled by HMDC, thereby preventing any acceleration of their depletion and preserving

lands in other areas of the State from becoming disposal areas.[10]

III

It is in the light of these facts and with a full realization of the magnitude of the problem, that we address ourselves to the issue as to whether or not the statutes and regulations under attack must fall because they are found to constitute an impermissible burden upon interstate commerce. In both cases now before us the State preliminarily contends that the question of the significance of the burden should not be reached, as the movement of garbage [466] and refuse, things not of commercial value and harmful to the health and welfare of the citizens of the State, does not in fact constitute interstate commerce within the meaning of the constitutional phrase. Therefore, it is argued, any statutes or regulations prohibiting the importation of these deleterious and valueless substances would not violate the Commerce Clause. The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, through the promulgation of regulations by DEP, has in effects been amended to exclude only that refuse which has no value either for fuel or recycling purposes.

The theory that objects harmful to the general public fall beyond the purview of the Commerce Clause has long been recognized by the United States Supreme Court.

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10. There is every indication that this was the true reason for the enactment of the amendments to the Waste Control Act. (L. 1973, c. 363). Following the promulgation of the regulations banning out-of-state dumping in HMDC, the out-of-state wastes were then carried to smaller landfill sites in New Jersey which had been originally designed to serve only neighboring municipalities. Thus, in order to prevent the total depletion of these landfills, a state-wide ban on solid waste imports was enacted.

Perhaps the best articulation of this doctrine appears in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 8 S. Ct. 689, 31 L. Ed. 700 (1888):

> • • • Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightly exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. [125 U. S. at 489, 8 S. Ct. at 700, 31 L. Ed. at 708]

Accord, Baldwin v. Seelig, 294 U. S. 511, 525, 55 S. Ct. 497, 79 L. Ed. 1032, 1039 (1935); *Sligh v. Kirkwood*, 237 U. S. 52, 59-60, 35 S. Ct. 501, 59 L. Ed. 835, 838 (1915). *See Crossman v. Lurman*, 192 U. S. 189, 196-97, 24 S. Ct. 234, 48 L. Ed. 401, 404 (1904); *Plumley v. Massachusetts*, 155 U. S. 461, 468, 472, 15 S. Ct. 154, 39 L. Ed. 223, 225, [467] 227 (1894). Also pertinent to the proposition that garbage or refuse is not an article of interstate commerce is the decision in *Clason v. Indiana*, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). That case involved the validity of an Indiana statute which required that within

24 hours after the death of certain large animals, the owners should burn or bury the carcasses or deliver them to a disposal plant licensed to do business within the state. Transportation for disposal to points outside the state was prohibited. 306 U. S. at 441, 59 S. Ct. 609, 83 L. Ed. at 860. The Supreme Court, after recognizing that the purpose of the statute was not discriminatory, but rather to promote the health of the people, concluded that no impermissible burden on interstate commerce had been shown to exist or as likely to occur. *Id.* at 444, 59 S. Ct. 609, 83 L. Ed. at 862.

The teaching of these cases seems to be that commodities or substances injurious to the public health are not "articles of commerce" within the meaning of the constitutional phrase. Their lack of market value coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause.

Nevertheless, refuse or solid waste may have intrinsic value of its own. As the trial judge noted in *Hackensack Meadowlands*, ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity." 127 N. J. Super. at 170. Based on this factor, that court concluded that "the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce." *Id.* We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for re-cycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce [468] is involved, as these regulations do

clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.

The amendments to the Waste Control Act, N. J. S. A. 13:1I-9 and 13:1I-10,[11] totally banning the disposal of solid waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless, as we have pointed out, the DEP regulations, issued in response to this legislation, do except from the ban on out-of-state refuse those types of solid waste which may have a value for recycling or for use as fuel.[12] In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of "merchantable" items or legitimate "articles of trade," as those wastes which can be put to effective use are explicitly excepted from the ban. Any assertion that the Commerce Clause applies here must therefore rest on the proposition that the mere transportation and disposal of valueless waste between states constitutes interstate commerce within the meaning of the constitutional provision.

A short time ago, in *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E. D. Pa. 1965), *aff'd*, 357 F. 2d 806 (3d Cir.), *cert. denied*, 384 U. S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966), the transportation and disposal of refuse was itself specifically found to constitute interstate commerce. That case was a Sherman

11. Quoted above in footnote 1.

12. DEP was enjoined by the decision below from enforcing these regulations as well as the relevant sections of the Waste Control Act. These regulations are quoted in footnote 2 above.

antitrust action brought against an association of refuse removers in the greater Philadelphia area who collected in Pennsylvania but often dumped in New Jersey. 242 F. [469] Supp. at 796. The District Court found that the government had clearly met its burden of showing that defendants' business was commerce, and was interstate in nature. *Id.* at 796-97. The court emphasized that the real subject of "trade or commerce" was not the worthless garbage that was being transported but rather the valuable service of its removal and disposal. *Id.* at 799.

The *Pennsylvania Refuse* case affords an illustration of the part played by the Commerce Clause as justification for bringing a particular business scheme within the reach of a Congressional regulatory enactment. The Sherman Act purports only to prohibit as illegal *certain* combinations in restraint of trade or commerce, namely, those where the trade or commerce is interstate in nature. This is the *affirmative* aspect of the Commerce Clause—to support some exertion of federal control or regulation. Similarly, persons engaged in a disposal business, interstate in nature, have been found to come within the scope of the federal Fair Labor Standards Act. *Schultz v. Instant Handling, Inc.*, 418 F. 2d 1019 (5th Cir. 1969); *Barnett v. A-1 Scavenger Service Co.*, 466 S. W. 2d 150 (Mo. Ct. App. 1971). But we deal here, in the case before us, with what are customarily called the "negative implications" of the Commerce Clause, the extent to which it may be invoked—not to support an exercise of federal regulation—but rather to strike down or restrict state legislation. The Supreme Court has understandably adopted a very sweeping concept of the Commerce Clause in its affirmative application, in order to further the extent of Congressional control. A much more confined notion of the reach of this provision has, however, been manifested, as we shall see, when it has been invoked to prohibit or limit state action.

IV

Assuming for present purposes that the service of transporting and disposing of solid waste in the factual con- [470] text here presented is in fact interstate commerce in the constitutional sense, we next consider the contention that the relevant sections of the Waste Control Act amount to an improper effort to regulate such commerce since such control lies within the exclusive cognizance of the federal government. In considering this preemption argument in relation to the cases before us, we note initially that in the *Hackensack Meadowlands* case the trial court determined that in this area of solid waste disposal no such preemption is to be found. 127 N. J. Super. at 171.

The need to determine whether, in a particular segment of interstate commerce, a state is precluded from acting because of federal preemption is the direct result of the landmark decision of the United States Supreme Court in *Cooley v. Board of Wardens,* 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851). There the Court for the first time clearly recognized that states have concurrent authority with the federal government to deal with those subjects of interstate commerce which do not necessarily require a national or uniform system of regulation. In a more recent statement appearing in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), Justice Brennan laid down the rule that a state would be precluded from acting only where either the "nature of the subject matter" or an "explicit declaration of congressional design" indicated that state efforts were to be precluded. *See* 373 U. S. at 143-152, 83 S. Ct. 1210, 10 L. Ed. 2d at 257-62.

The problem which arises in most instances where Congress has acted—as is here the case—results from there

having been a failure on the part of Congress to make clear whether there was or was not a desire and intent on its part to exercise exclusive control in a particular area. The Supreme Court has recognized that "in the final analysis, there can be no one crystal clear distinctly marked formula," *Hines v. Davidowitz,* 312 U. S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941), resort to which will in all cases unequivocally reveal Congressional intent. *Benson, The Supreme* [471] *Court and the Commerce Clause,* 1937-1970 at 277-78 (1970).

Fortunately, although Congress has acted in this field through the passage of the Solid Waste Disposal Act of 1965 and its subsequent amendments, it has clearly indicated its intention not to preempt the area. As we have noted earlier, federal legislation has thus far been largely limited to providing "financial and technical assistance and leadership" to develop new methods of disposal and resource recovery and to reduce waste. In the Congressional findings is a pronouncement that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . . ." 42 U. S. C. A. § 3251(a)(6). We also note that severe budgetary cuts in recent years have reduced federal action even below that originally envisioned in the Solid Waste Disposal Act. For example, the Nixon Administration cut the federal solid waste budget from $30 million in 1973 to a projected $5.8 million for the fiscal year 1974, and sought to restrict the federal role to the control and disposal of hazardous wastes. No further funds were provided for such items as research and development, and technical assistance was substantially curtailed. See Environmental Law Institute, *Federal Environmental Law* 1307-1310 (1974).

It is entirely clear that the case for federal preemption must fail. Congress has encouraged state action; it has not precluded it.

V

In considering whether the statutes and regulations here under scrutiny do or do not constitute an impermissible regulation of interstate commerce, we bear in mind that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. Seelig, supra,* 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 1038 (1935). Primarily the purpose sought to be served by including the Commerce Clause in the Constitution was to check or eliminate the *economic* discrimination among the states that had been so rampant under the Articles of Confederation. *E.g., Baldwin v. Seelig, supra,* 294 U. S. at 521-23, 55 [472] S. Ct. 497, 79 L. Ed. at 1037-38; *H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 533-35, 69 S. Ct. 657, 93 L. Ed. 865, 871-72 (1949); *Ribble, State and National Power Over Commerce* 3-4 (1937).

Despite this broad grant of power given Congress by the Commerce Clause, innumerable problems have continuously arisen. This is in large part because the states, in the exercise of their police power to protect the health, welfare and safety of their citizens, have passed many laws which often in effect do directly regulate interstate commerce. Thus over the years the United States Supreme Court has been called upon to arbitrate between these competing demands of state and federal power.

The cases before us present such a situation. We have no difficulty in finding, as did the courts below, that

extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State. Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw v. Byram Township,* 86 N. J. Super. 598, 602 (App. Div.), certif. denied, 45 N. J. 35 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> • • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission,* 120 N. J. Super. 118, 122 (App. Div. 1972); emphasis in original]

[473]

We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid,

and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power. See, for example, *Adams v. Shannon*, 7 Cal. App. 3d 427, 432, 86 Cal. Rptr. 641, 644 (Ct. App. 1970); Garton, *Ecology and the Police Power*, 16 S. D. L. Rev. 26 (1971).

Thus the underlying issue is whether or not this exercise of residual state power, obviously exerted for legitimate and important purposes, must fail because of the demands of the Commerce Clause. We do not deem it necessary or useful to retrace in any particular detail the history of the negative implications of the Commerce Clause or the manner in which this body of doctrine has evolved through successive decisions of the Supreme Court. Dicta in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 209, 6 L. Ed. 23 (1824) suggested that the intent of this grant of power to Congress had been to exclude entirely concomitant action on the part of the states. At least, however, since *Cooley v. Board of Wardens, supra*, 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851), it has been clear that state legislation will not necessarily be deemed unconstitutional simply because it can be shown that it may have some impact upon commerce that is interstate in nature. Over the years the Supreme Court has applied various tests and has adopted differing approaches in its treatment of the problem as to whether particular state legislation [474] does or does not fall within the interdict of this provision.

In 1938, in the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510,

82 L. Ed. 734, the Court considered a South Carolina statute that had established size and weight limits for trucks using state highways. The result of enforcing the statute was to exclude many vehicles coming from other states that were engaged in interstate commerce. The Court found that the statute did not violate the Commerce Clause. In commenting upon this case, Professor Engdahl recently observed,

> [T]he court now [in *Barnwell*] formulated better than had been articulated before the test of the negative implications of the commerce clause. In Stone's words, the court is to inquire "whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means or regulation chosen are reasonably adapted to the end sought." 303 U. S. at 190 [58 S. Ct. 510]. [*Engdahl, Constitutional Power: Federal and State* (1974) § 11.03, p. 272]

In addressing the first of these criteria– whether the state legislature has acted within its province–at least two subordinate issues demand attention: can it be said that the subject matter of the legislation has been preempted by Congress, and is the enactment a valid and proper exercise of the state's police power. It was probably implicit in *Barnwell*, as it has been explicit in both earlier and later decisions, that state legislation must also meet a third test –whether the burden imposed on interstate commerce by the state statute exceeds or outweighs the benefit accruing to the state. Recent commentators have questioned whether this third "weighing" test should be, or will continue to be, applied. *Engdahl, op. cit. supra*, § 11.08, pp. 290-94; *Note*, 45 *Univ. of Col. Law Rev.* 487, 489 (1974).

In any event it seems clear that it has not yet been entirely abandoned. *Pike v. Bruce Church*, 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174, 178 (1970). *But see Brotherhood of Loco-* [475] *motive Firemen & Enginemen v. Chicago, Rock Island & Pacific R. R.*, 393 U. S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968).

In the case before us it is evident that the New Jersey Legislature—and the agencies that adopted implementing regulations—were looking to the accomplishment of a wholly legitimate end well within their competence. In seeking to prolong the useful lifespan of landfill areas within the state they were ministering to the needs of public health as well as endeavoring to preserve the environment. As we have indicated, there has very clearly been no federal preemption and the legislation is certainly an appropriate exercise of the state's police power. *Cf. Oxford Consumer Discount Co. of North Philadelphia v. Stefanelli*, 102 N. J. Super. 549, 567-574 (App. Div. 1968), modified, 104 N. J. Super. 512 (App. Div. 1969), further modified, 55 N. J. 489 (1970). Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. Less than total exclusion of solid waste generated outside New Jersey would have been of no avail. Even the means that have been adopted—apparently the best available—offer no certainty of providing more than much needed time within which to devise by technological effort and ingenuity a satisfactory ultimate solution. Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or significant discrimination in favor of local collectors. Refuse

amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state.

The further step in the testing process would require us to assay the burden on interstate commerce and to weigh it against [476] the benefit to the state. The burden is slight indeed. There is nothing to indicate that adequate alternatives are not available in both New York and Pennsylvania. The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks. When balanced against the dangers to public health and to the environment that this legislation seeks to avert, these relatively small costs and modest inconveniences seem minor indeed.

Other state and federal courts in very recent years have not hesitated to sustain legislation having as its aim the protection of health and the maintenance of environmental values and natural resources against attacks based upon alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Commission*, 15 Or. App. 618, 517 P. 2d 691 (1973) (ban on non-returnable beverage containers); *Proctor & Gamble Co. v. City of Chicago*, 509 F. 2d 69 (7th Cir. 1974), *cert. denied* 421 U. S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A. 2d 1 (Sup. Jud. Ct. Me. 1973), appeal dismissed, 414 U.S. 1035, 94 S. Ct. 532, 38 L. Ed. 2d 326 (1973) (prevention and control of marine oil spillage); *Construction Industry Associa-*

tion of Sonoma County v. City of Petaluma, 522 F. 2d 897 (9th Cir. 1975) (ban on further building).[13]

We know that not every hindrance to interstate commerce that may result from a state law will be deemed sufficient to invalidate the legislation. We know too and are constantly becoming more acutely aware that the environmental resources as well as ecological and human values that have [477] become so endangered upon this "plundered planet," insistently demand every reasonable protection that can possibly be recruited.

In this area the state has not only a right to protect its own resources, but also the duty to do so, in the interest of its citizens, as well as others. We are not here concerned with the problem presented in such cases as *West v. Natural Gas Co.*, 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) and *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). There the Court was called upon to review state statutes restricting the flow of natural gas to citizens of the state in question. Quite understandably it was found that the enactments did violence to the Commerce Clause. In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic. We know that there resides in each of the severel states a power to protect its natural resources. This power is part of what has been called its quasi-sovereignty. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907), the Supreme Court entertained an original action by the State

13. A similar legislative ban on the importation of waste materials has been enacted in the State of Maine. See *Maine Rev. Stat. Ann. Title* 17, § 2253 (Supp. 1974-75).

of Georgia, in which the latter sought to restrain an out-of-state manufacturer from permitting deleterious fumes to be blown into the plaintiff state and do damage to trees, fields and crops. In determining that an injunction would issue, practically as of right, Justice Holmes said,

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. [478] It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. [206 U. S. at 237, 27 S. Ct. at 619, 51 L. Ed. at 1044]

It is true that there the Court dealt with a nuisance, which is not present here. Yet, the case has relevant import. The protection to its environment and natural resources that a state can demand of right from a federal court should be equally available to it by way of protective legislation. We do not mean to be understood as saying that every assertion of a state's quasi-sovereign right to protect its environment, ecological values and natural and human resources will be sustained regardless of the impact upon interstate commerce. Clearly this is not so. But where the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial

to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action.

The judgments of the respective trial courts are hereby reversed; all stays or injunctive orders are vacated.

For affirmance in both cases: Chief Justice HUGHES, Justices MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD and Judge COLLESTER—6.

For reversal: None.

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill and Development operates a sanitary landfill in Burlington County, N. J. and is so certified by the

Public Utility Commission and Department of Environmental Protection.

3. Approximately 75% of the volume of refuse disposed of at this site comes from the City of Philadelphia.

4. This landfill also serves several New Jersey communities as well as private haulers in New Jersey who serve industry and commerce located in this state.

5. The operation of this landfill in compliance with the Department of Environmental Protection regulations requires a large dollar volume of business. Without the benefit of the Philadelphia contract this sanitary landfill operation will not be economically feasible.

6. It is likely that Landfill and Development Company will be unable, for financial reasons, to continue operating a sanitary landfill facility in the event it loses the volume of solid waste generated by the City of Philadelphia.

LEO F. HUGHES, 3rd
Leo F. Hughes, 3rd

Sworn to and Subscribed before me this 18th day of November, 1975.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires March 16, 1977

AFFIDAVIT OF DAVID J. DAMIANO.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

DAVID J. DAMIANO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am Commissioner of the Department of Streets of the City of Philadelphia, Pennsylvania, one of the above-named plaintiffs.

2. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of an

application to the New Jersey Supreme Court on an emergent basis, for temporary stay of judgment and continuation of the injunctive order heretofore entered in connection with the above captioned matter.

3. I have prepared affidavits dated, respectively, January 16, 1974 and May 7, 1974 with respect to the above captioned litigation, and said affidavits have been filed with the Court. There is no substantial or material change in any of the information contained in said affidavits, [except that the City of Philadelphia has entered into an agreement with an additional New Jersey landfill company (Burlington Environmental Management, Inc.)], and the information contained in same is incorporated by reference herein as if fully set forth.

4. In the event injunctive relief is not immediately given, city collected solid wastes would accumulate on the streets of Philadelphia in excess of 2,000 tons daily creating a health crises in less than two weeks.

DAVID J. DAMIANO
David J. Damiano

Sworn to and Subscribed before me this 18th day of November, 1975.

RICHARD A. RAGSDALE
Richard A. Ragsdale,
Attorney-at-Law of New Jersey

ORDER GRANTING STAY AND CONTINUING INJUNCTIVE RELIEF.

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74
September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter being opened to the court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs-respondents, Herbert F. Moore, Esq. appearing in the presence of Assistant Attorney General Stephen L. Skillman, attorney for defendants-appellants for an order temporarily staying the judgment of the Supreme Court of New Jersey in the above captioned matter and temporarily continuing the injunctive order heretofore entered by the Superior Court of New Jersey, Law Division, in connection therewith, and good cause being shown,

It is on this 20th day of November, 1975,

ORDERED, that the judgment of this court heretofore entered in this action on November 18, 1975 against plaintiffs-respondents be and hereby is temporarily stayed and that the injunctive order heretofore issued in connection with this case is hereby temporarily extended until further order of the court; and it is

FURTHER ORDERED, that plaintiffs-respondents shall file a memorandum with this court, and serve same upon the parties to this proceeding, not later than Wednesday, Nov. 26, 1975, demanding such relief as they deem appropriate including argument in support thereof, and defendants-appellants shall thereafter have a period of 10 days within which to file and serve a responsive memorandum thereto.

RICHARD J. HUGHES,
C. J.

Consent as to form:
William F. Hyland, Attorney General
of New Jersey
Attorney for Defendants-Appellants,
State of New Jersey, et al.

By: STEPHEN L. SKILLMAN,
Stephen L. Skillman,
Asst. Attorney General
Jamieson, McCardell, Moore, Peskin and Spicer

By: HERBERT F. MOORE
Herbert F. Moore

NOTICE OF MOTION AND MOTION FOR REMAND, STAY OF JUDGMENT AND CONTINUATION OF RESTRAINTS.

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

To: Stephen L. Skillman, Esq.
Assistant Attorney General
State House
Trenton, N. J. 08625

NOTICE is hereby given by the undersigned, counsel for the plaintiffs-respondents, of the filing of a Motion with

the Supreme Court of New Jersey in accordance with the copy attached hereto.

Dated: November 26, 1975

JAMIESON, MCCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al,
Defendants-Appellants.

TO: Honorable The Chief Justice
and Associate Justices of
Supreme Court of New Jersey:

The plaintiffs-respondents, City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.) move for an order of the New Jersey Supreme Court, in order of preference, and in the alternative, for the following relief:

A. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) all issues raised in the complaint; and (2) whether, and for what period, injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey;

B. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) taking of private property for public use without just compensation; (3) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

C. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

D. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

E. Stay of judgment and continuation of injunctive relief pending a determination by the United States Supreme Court of an application by plaintiffs for continuing injunctive relief pending appeal.

Plaintiffs-Respondents will rely upon the annexed Brief and Appendix in support of said Motion.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

AFFIDAVIT OF DAVID J. DAMIANO.

(November 24, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et. al.,
Defendants-Appellants.

---

1. I am the Commissioner of Streets of the City of Philadelphia and have personal knowledge of the matters contained herein.

2. In my capacity as Commissioner of Streets, I am legally charged with the duty to make suitable provisions for the disposal of solid waste materials collected by said City.

3. Until November 10, 1975, approximately 10,000 tons of solid waste was disposed of each week by incineration in facilities owned and operated by said City.

4. Solid waste incineration at the facilities referred to in paragraph 3 was discontinued by order of the United States District Court for the Eastern District of Pennsylvania because the operation of said facilities violated air pollution standards established by the United States Environmental Protection Agency.

5. In order to provide appropriate incineration facilities to comply with applicable air pollution requirements, it will cost approximately $100,000,000 and take 7 to 10 years.

6. When it was discovered that the aforesaid incineration facilities were violating federal air pollution standards, an analysis of alternative disposal possibilities was undertaken. Potential landfill sites in the Commonwealth of Pennsylvania and the State of New Jersey were identified and the feasibility of such sites was evaluated.

7. A solid waste disposal system serving a major metropolitan area must be reliable and easily accessible. Factors considered in choosing suitable sites include capacity, distance, highway patterns, traffic congestion, roadway weight limitations, and cost.

8. An assessment has been made by my department of landfill sites in Pennsylvania on file with the Department of Environmental Resources (DER) within a 100 mile radius of the City of Philadelphia.

9. No site in Pennsylvania has been found which offers the degree of dependability essential to any reasonable solid waste disposal plan.

10. Solid waste collected in the City of Philadelphia is compacted at plants owned and operated by the City and placed upon 65 yard tractor-trailer trucks for transfer to disposal sites. The use of such plants permits solid waste collection vehicles to engage in collection services to the greatest possible degree by alleviating them from the necessity of travelling to far off disposal sites. It also reduces the number of vehicles that would otherwise travel to such sites.

11. Traffic congestion upon Pennsylvania roadways around Philadelphia is acute. It is not possible to establish a firm schedule containing the requisite dependability under such circumstances.

12. County and local roadways leading to landfill facilities in Pennsylvania which have been assessed by my department presently have weight limitations which would exclude 65 yard tractor-trailers. The experience with snow removal on roadways to the west of Philadelphia has been unsatisfactory and mitigates against their use as a dependable roadway network for solid waste disposal purposes.

13. Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively empowered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever.

14. My department has learned that private contractors have heretofore entered into agreements with landfill operators to take effect in the event solid waste collection in Pennsylvania cannot be disposed of in New Jersey. Such arrangements have exhausted potentially available

landfill acreage at the sites in Pennsylvania which could be used for truck haul.

15. Even if the arrangements referred to in paragraph 14 of this statement had not been made and landfill space was available in Pennsylvania, the City of Philadelphia could not responsibly have entered into agreements with said landfills for the reasons expressed in paragraphs 11 and 12 of this statement. In addition, the distance of said sites from the City would require the purchase of additional vehicles which are not available for immediate delivery.

16. If all solid waste collected in the City of Philadelphia is not disposed of on a daily basis, a critical health problem would quickly develop. Facilities do not exist for accumulating household solid waste products. Such waste would necessarily pile up upon the streets of the City and present an immediate threat to the health and safety of the residents thereof and to the quality of the environment.

17. A thorough and diligent search for suitable disposal sites within the City has been made and no such sites have been located.

18. The only short term feasible solution to solve Philadelphia's disposal problems has been to reclaim strip mines situated in the western part of the Commonwealth of Pennsylvania. Serious and concerted efforts to establish a pilot project have been underway since 1967 with the assistance and full cooperation of the United States Environmental Protection Agency.

19. It is estimated that by 1978, 20 per cent of Philadelphia's solid waste will be hauled by rail to strip mines. Specifications for the project are in the process of being completed. Immediate effectuation of the plan cannot be implemented because special order railway rolling stock must be manufactured in connection with the plan.

20. Until the reliability and dependability of the rail haul proposal has been demonstrated, it would not be reasonable to contemplate the disposal of greater quantities of solid waste in such manner.

21. The single alternative which would adequately insure the timely disposal of Philadelphia's solid waste at the present time is incineration in the facilities referred to in paragraph 3 of this statement.

22. The air pollution occasioned by such incineration would adversely affect the residents of both the Commonwealth of Pennsylvania and the State of New Jersey.

23. The City of Philadelphia has no alternatives within the foreseeable future other than incinerating its solid waste in violation of the order of the Federal District Court or permitting same to accumulate upon the streets of the City. My department has continuously explored other viable disposal plans, and is still doing so on an ongoing basis, but no alternatives other than those stated in this paragraph are presently available.

24. Approximately 225,000 persons come to Philadelphia from New Jersey each working day. Upon information and belief, said persons generate a substantial quantity of solid waste which must be disposed of by the City of Philadelphia.

Commonwealth of Pennsylvania:

County of Philadelphia:

Affidavit

David J. Damiano, being duly sworn according to law deposes and says that he is Commissioner of Streets for the City of Philadelphia, and that the facts set forth in the attached statement are true and correct to his personal knowledge.

DAVID J. DAMIANO
David J. Damiano

Sworn to and subscribed before me this 24th day of November, 1975.

CATHERINE M. ARRA
Catherine M. Arra, Notary Public
Philadelphia, Philadelphia County
My Commission Expires Dec. 5, 1977
Member, Pennsylvania Association of Notaries

AFFIDAVIT OF MARVIN MAHAN.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } ss.:

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc. a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. MAC Sanitary Landfill, Inc. and Kinsley's Landfill, Inc. which operate sanitary landfill facilities in Gloucester County, New Jersey are wholly owned subsidiaries of Scientific, Inc.

3. MAC Sanitary Landfill, Inc. leases approximately 80 acres of land, of which approximately 36 acres are used for sanitary landfill purposes. Pursuant to engineering plans and designs heretofore filed with the New Jersey Department of Environmental Protection, it is anticipated at least 500,000 tons of solid waste can be disposed of at said sanitary landfill facility.

4. The site owned and operated by Kinsley's Landfill, Inc. is comprised of approximately 335 acres of land of which approximately 65 acres are presently used for sanitary landfill purposes. Preliminary elevation plans have been filed with the New Jersey Department of Environmental Protection for the entire remaining portion of the tract, and engineering plans and designs are in the process of being completed. It is presently anticipated that not less than 15,000,000 tons of solid waste can be disposed of at said landfill site.

5. In order for Kinsley's Landfill, Inc. to operate a sanitary landfill facility upon the aforesaid 65 acre tract, it was required by the Department of Environmental Protection that certain environmental controls be provided for the site. Said environmental controls cost approximately $500,000, almost all of which has been spent by Kinsley's.

6. At the time the aforesaid 335 acres were purchased for operation of a sanitary landfill by Kinsley's Landfill, Inc., and environmental controls were made upon the 65

acre portion of said tract, an agreement was reached with the City of Philadelphia for the disposal of solid waste originating in said City. The aforesaid 335 acre tract would not have been purchased and the environmental improvements thereto would not have been made in the absence of said agreement.

7. MAC and Kinsley presently have a contract with the City of Philadelphia for a minimum of 800,000 cubic yards (200,000 tons) and a maximum of 1,200,000 cubic yards (300,000 tons) which runs for 10 years and is of vital importance to the ability of MAC and Kinsley's to continue in operation.

8. In a study prepared for Gloucester County by Roy Weston, a consulting engineer, it was estimated that the total domestic solid waste generated in Gloucester County for the year 1975 would be 95,000 tons and that the projected domestic solid waste to be generated in said County during 1985 would be 150,000 tons.

9. There are presently 12 sanitary landfill facilities operating in Gloucester County, New Jersey.

10. Both the MAC and Kinsley landfills were planned and developed to handle primarily solid waste from Pennsylvania and the City of Philadelphia. At present, approximately 80 per cent of the total volume originates from either Pennsylvania or the City of Philadelphia. In the event the out-of-state ban is enforced, it will be necessary to either close one or both of the landfills from lack of volume. In addition, it will be necessary to apply to the Public Utility Commission for a substantial increase to make up for the loss of revenue that will result from

the exclusion of out-of-state refuse. Without such a rate increase, the landfill will not be able to operate.

Marvin N. Mahan
MARVIN MAHAN

Sworn to and Subscribed before me this 25th day of November, 1975.

ARTHUR MEISEL
Arthur Meisel
Atty. at Law of N. J.

AFFIDAVIT OF RICHARD A. PELUSO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

– and –

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. I have examined the report entitled *Solid Waste: A Coordinated Approach*, 7th edition, prepared by the State of New Jersey County and Municipal Government Study Commission. This report is usually referred to as the Musto Report. This report takes the position, based upon certain acreage calculations of existing landfill sites that the available landfill acreage in New Jersey will be entirely exhausted by 1981, and that the landfills serving Bergen, Essex, Hudson, Passaic and Union Counties, which produce 48% of the State's annual volume of solid waste, will be exhausted in 1975.

5. The aforesaid calculations are based on inaccuracies and misconceptions of the landfill business. On page 4 of the report, it is stated that the calculations of landfill acreage are based upon an average depth of fill of 15 feet, including earth cover and minimal compaction. In actual practice throughout New Jersey, the average fill in major landfills is at least 40 feet.* This conclusion can be supported by examination of the engineering designs on file in the Department of Environmental Protection. I have personally been involved in engineering design of a significant number of landfills in New Jersey, and have personally made site inspections of a large percentage of the major landfill sites in the state, all of which support this conclusion. The significance of the variance in full results in substantial increase in the actual capacity of available landfill acreage as of 1972.

6. According to Table IV-1 on page 37 of the Musto Report, the available landfill acreage as of 1972 is 9,880 acres. To determine landfill capacity based on the assumption of 15 feet depth of fill, the Musto Report calculates that 783 acres of landfill space will be used up during the year of 1972, when in actuality, less than ½ of the acreage will be thoroughly used up. This is based on 40 feet rather than 15 feet fill. This will effectively extend the landfill life throughout the State of New Jersey from 1981 to approximately 1990.

7. In addition to the engineering designs on file with the Department of Environmental Protection and giving consideration to landfill designs previously filed with the Department but not yet taken into consideration in their calculations, together with landfill designs of which I have personal knowledge that are in the process of being developed, there is available as of November 25, 1975, approximately 180,000,000 in place cubic yards for disposal. The effect of this would be to extend existing landfill life expectancy to approximately 1986. This evaluation does not take into consideration other landfills presently being designed or contemplated by other engineering concerns, which will add to the presently known life expectancies. This conclusion is in harmony with the conclusion the Musto Report should have reached had it properly calculated the average depth of fill at 40 feet rather than 15 feet.

8. The waste generated in Pennsylvania, and being disposed of in New Jersey is estimated at 10,000 tons a week. A 200 acre site brought to 50 feet elevation would satisfactorily handle this disposal for a period of approximately 15 years.

9. Sanitary landfilling of devastated areas resulting from mining operations is an ideal land reclamation project

if operated in accordance with the present Department of Environmental Protection rules and regulations. While there are no statistics available as to the amount of such devastated acres in New Jersey, it is readily apparent to an observer, and particularly to me, who specializes in waste disposal, that there are many sites throughout New Jersey that are ideally suited for this type of land reclamation in accordance with Department of Environmental Protection regulations. The use of such areas for landfill purposes would significantly increase the long-range capacity for waste disposal in New Jersey.

10. The Musto Report, on page 38, table 4, reveals that by the end of 1975, Bergen, Essex, Hudson, Passaic and Union Counties will have zero acres available. This, in fact, is not true since there are landfills in operation continuing in these areas.

11. On behalf of Interstate Waste Removal Co., Inc., I have submitted a preliminary engineering design to the New Jersey Department of Environmental Protection for a certain severely mined tract of land in Bordentown Township, Burlington County, New Jersey, comprising 93 acres and located upon Block 134, Lots 3, 4, and 14 as same appear on the Bordentown Township Tax Atlas.

12. When brought to final grade and cover, properly engineered and designed sanitary landfills are ideally suited for public recreational uses, and may also be used for specific commercial and industrial projects which have been considered at the time engineering plans and designs were filed with the New Jersey Department of Environmental Protection. In filing plans which contemplate commercial and industrial use, certain portions of the proposed landfill facility may be left untouched in order to avoid problems concerning support of heavy structures.

13. Sanitary landfilling may be used as an economical process to recover ravaged land. The recovery of land in this manner may have the dual advantages of recreating recreational space and green acres, while simultaneously providing a facility from which methane gas may readily be recovered and processed into natural gas and fed into the commercial gas system.

•Interpretation of the Notice of Public Hearing dated March 1975 issue of the New Jersey Register, Document #021-75-02 dated February 14, 1975 and signed by David Bardin, Commissioner of Environmental Protection indicates that 52 constituting the major landfill facilities within the State of New Jersey handle 80% of the solid waste disposed of in the State.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and subscribed before me
this 25th day of November, 1975.

FLORENCE W. EDWARDS
Florence W. Edwards

Notary Public of New Jersey
My Commission Expires May 29, 1976

AFFIDAVIT OF ARTHUR MEISEL.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

—and—

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

ARTHUR MEISEL, of full age, being duly sworn according to law, upon his oath, says:

1. I am an Attorney-at-Law licensed to practice in the State of New Jersey, and have personal knowledge of the matters contained herein.

2. On Friday, November 21, 1975, I had a telephone conference with Mark L. First, Esquire, a Deputy Attorney General. Mr. First stated to me that there were existing plans to provide additional acreage for disposal purposes in the Hackensack Meadowlands District.

ARTHUR MEISEL
Arthur Meisel

Sworn to and subscribed before me
this 25th day of November, 1975.

FLORENCE W. EDWARDS
Florence W. Edwards
Notary Public of New Jersey
My Commission Expires May 29, 1976

AFFIDAVIT OF JOHN P. FAZZIO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

Civil Action

CITY OF PHILADELPHIA, etc., et als.,
Plaintiffs-Respondents,

– and –

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al,
Plaintiff-Intervenors-Respondents,

– against –

STATE OF NEW JERSEY, et al,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF CAMDEN } *ss.:*

I, JOHN P. FAZZIO, of full age, being duly sworn according to law upon my oath, depose and say;

1. I am the President of John P. Fazzio Landfill, Inc., trading as John P. Fazzio Landfill Co., a solid waste disposal utility of the State of New Jersey.

2. I make this affidavit in support of the Respondent's application to the Supreme Court of the State of New Jersey to stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co. v. State of New Jersey, et als.

3. Since 1969, the John P. Fazzio Landfill Co. has been accepting waste that has been generated within the State of Pennsylvania and this waste has been deposited at the John P. Fazzio Landfill Co. in accordance with the rules and regulations of the New Jersey Department of Environmental Protection and under the constant supervision of the New Jersey Department of Environmental Protection.

4. About Seventy-Five (75%) per cent of all waste deposited at the John P. Fazzio Landfill Co. originates in the State of Pennsylvania.

5. The New Jersey Department of Environmental Protection, Bureau of Solid Waste Management has stated that the John P. Fazzio Landfill Co. is one of New Jersey's largest landfills as far as quantities of waste being deposited.

6. If the Honorable Supreme Court of the State of New Jersey does not stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co. v. State of New Jersey, et als., the adverse results to the John P. Fazzio Landfill Co. will be serious, immediate and irreparable and will cause the John P. Fazzio Landfill Co. to cease its solid waste disposal operations because the company will not be able to operate with the loss of Seventy-Five (75%) per cent of its revenues.

7. Once the John P. Fazzio Landfill Co. is closed, the lease with the owners of the land upon which the landfill is situated, i.e. Bell Harbor, Inc., will be terminated and this landfill area will be forever lost because the owners of the land will use it for commercial and housing purposes.

8. The John P. Fazzio Landfill Co. has numerous fixed costs and has undergone substantial costs and will undergo costs of approximately $2,000,000.00 to purchase its new site and to install environmental protection liners, environmental protection dikes, environmental protection leachate collection systems, etc. and the John P. Fazzio Landfill Co. will not be able to continue its operations with a loss of Seventy-Five (75%) per cent of its income.

9. If the Honorable Supreme Court of New Jersey does not stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Co. v. State of New Jersey, et als., the numerous residents of the State of New Jersey who depend upon the solid waste disposal services of the John P. Fazzio Landfill Co. will not be able to use the facilities of the John P. Fazzio Landfill Co. if it closes.

10. The closing of the John P. Fazzio Landfill Co. will result in even less landfill area that can be used by the residents and citizens of the State of New Jersey as well as the residents and citizens of the State of Pennsylvania.

11. I make this affidavit to the Honorable Court to stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Co. v. State of New Jersey, et als., until Respondent John P. Fazzio Co. can present its appeal to the United States Supreme Court and until such time as the United States Supreme Court agrees to hear the appeal and until it acts

on our intended request for a stay of the decision of this Honorable Court.

JOHN P. FAZZIO (Pres.)
John P. Fazzio

Sworn and subscribed to before me this 25 day of November, 1975.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

AFFIDAVIT OF JOSEPH PETRUZZI.

(November 25, 1975.)

STATE OF NEW JERSEY
COUNTY OF CAMDEN } *ss.:*

I, JOSEPH PETRUZZI, of full age, being duly sworn according to law, depose and say:

1. I am the Mayor of the Borough of Bellmawr in the County of Camden, State of New Jersey.

2. The John P. Fazzio Landfill Co. is located in the Borough of Bellmawr, County of Camden, State of New Jersey.

3. The Borough of Bellmawr depends upon the solid waste disposal services of the John P. Fazzio Landfill Co.

4. The John P. Fazzio Landfill Co. has operated its sanitary landfill in a manner that has not been offensive or detrimental to the community.

5. The John P. Fazzio Landfill Co. has notified the Borough of Bellmawr that if the decision of this Honorable Court in the matter of City of Philadelphia, etc., et als., and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et als., is not stayed, then the John P. Fazzio Co. will not be able to continue its sanitary landfill operations with the ban of Pennsylvania wastes and the loss of substantial revenues to John P. Fazzio Landfill Co.

6. If the John P. Fazzio Landfill Co. closes and discontinues its sanitary landfill operations, the Borough of Bellmawr may be left with no other sanitary landfill for disposal of its wastes. Without a proper place to dispose of its solid waste, the Borough of Bellmawr would face an immediate and irreparable health crisis.

7. Additionally, I believe that the people of the State of Pennsylvania and the people of the City of Philadelphia should be given more time in order to develop reasonable alternatives within the State of Pennsylvania to its solid waste crisis.

8. I make this affidavit in support of the application of the John P. Fazzio Landfill Co. to have the Honorable Supreme Court of New Jersey stay its decision in the matter of City of Philadelphia, etc., et als., and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al. v. State of New Jersey, et als.

JOSEPH PETRUZZI
Joseph Petruzzi

Sworn and subscribed to before me this 25th day of November, 1975.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

LETTER FROM MAYOR OF BOROUGH OF RUNNEMEDE TO ACTING DIRECTOR, DIVISION OF MARINE SERVICES, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION DATED DECEMBER 6, 1974.

(Letterhead of)

BOROUGH OF RUNNEMEDE

December 6, 1974

Mr. Donald T. Graham, Acting Director
Division of Marine Services
Department of Environmental Protection
P. O. Box 1889
Trenton, New Jersey 08625

Re: Bell Harbor, Inc.
Type B Wetlands Permit

Dear Mr. Graham:

This is to advise you that at the regular meeting of Mayor and Council held in December 3, 1974, the governing body officially and publicly stated they were in favor of Bell Harbors application permit being approved.

The Borough of Runnemede has contacted for landfill facilities for several years with the Fazzio Landfill. During that time we have observed that the landfill has been operated in a safe, adequate and proper manner and has complied with the standards and regulations set forth by the New Jersey Department of Environmental Protection.

It is our understanding that unless permission is granted, the landfill will be closed very shortly. At this time we have no other landfill available that could not

only render the present service, but would create an additional hardship if we were to be forced to travel a greater distance and at a much higher cost.

Therefore, Mayor and Council urgently request that the Bell Harbor application be given very careful consideration and hopefully approved so that this essential facility may continue their landfill operation.

Thanking you for your consideration in the above matter, I remain.

Very truly yours,
DAVID L. VENELLA,
David L. Venella,
Mayor, Borough of Runnemede

cc:
John P. Fazzio
The Honorable Hermia Lechner, Division of Water Resources
Thomas E. Hampton, Supervisor, Wetlands Section
Michael E. Heenehan, Hearing Examiner
Colonel C. A. Selleck, Dept. of the Army, Corps of Engineers
James Johnson, Supervisor Riparian Section
Vincent J. Dotoli, Law Offices

AFFIDAVIT OF BERNHARDT V. LIND.
(December 8, 1975.)

AFFIDAVIT.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

BERNHARDT V. LIND, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Chief of the Bureau of Solid Waste Management in the Office of Solid Waste Administration within the Department of Environmental Protection. I have held this position since March 1973.

2. The records of the State of New Jersey, Department of Environmental Protection, Bureau of Solid Waste Management indicate that in the calendar year 1974 2.4 million tons of out-of-state waste was buried in New Jersey landfills, an increase of .9 million tons over the previous year. Of that 2.4 million tons of waste 1.7 million tons originated in the State of Pennsylvania and .7 million tons originated in the State of New York.

3. The records of the Bureau of Solid Waste Management further indicate that all of the 1.7 million tons of Pennsylvania generated waste are disposed of in 13 New Jersey landfills. These 13 landfills which accept a total of 2.9 million tons per year of waste have a total life expectancy of 1.6 years assuming the same volume of disposal. If out-of-state waste were to be excluded these sites would have a total life expectancy of 3.9 years. The resultant increase of life expectancy in these landfills would make it possible for the Department of Environmental Protection ("DEP") to delay approval of the opening of new landfills and/or the expansion of old landfills in the

hopes of finding a viable alternative method of disposal and thus obviating the necessity of laying waste to additional New Jersey acreage. Of the 13 landfills which accept Pennsylvania waste for disposal, 6 have applications pending with or have indicated their intention to apply to the DEP for increased height limitations at their landfills or for the approval of additional acreage. In addition, there is an application currently pending to operate a 92 acre site in Bordentown Township. The thirteen landfills are:

a. Amadei Landfill—a 53.5 acre site located in Gloucester Township, New Jersey, approximately 10 miles from Center City Philadelphia. This facility has had yearly loadings of 272,000 tons, 9,800 of which originate in Pennsylvania. This landfill has reached capacity but is still operating.

b. Buzby Brothers Landfill—a 19.5 acre site located in Voorhees Township, New Jersey, approximately 9 miles from Center City Philadelphia. This facility has yearly loadings of 117,000 tons, 7,000 tons of which originate in Pennsylvania. This landfill has reached capacity but is still operating.

c. John P. Fazzio Landfill—a 38 acre site located in Bellmawr Borough, New Jersey, approximately 10 miles from Center City Philadelphia. This facility has yearly loadings of 794,000 tons, 540,000 tons of which originate in Pennsylvania. This landfill has reached capacity but is still operating.

d. Florence Landfill—a 30.5 acre site located in Florence Township, New Jersey, approximately 27 miles from Center City Philadelphia. This site has yearly loadings of 13,000 tons, 4,000 tons of which

originate in Pennsylvania. This site has a remaining capacity of 157,000 tons.

e. Harris Landfill—a 26 acre site located in Harrison Township, New Jersey, approximately 22 miles from Center City Philadelphia. This facility has yearly loadings of 12,600 tons, 1,055 of which originate in Pennsylvania. This landfill has 220,000 tons of life remaining.

f. Hawthorne, Inc. Landfill—a 60 acre site located in National Park Borough, New Jersey, approximately 12 miles from Center City Philadelphia. This site accepts demolition material only and has a yearly loading of 31,000 tons, 8,600 tons of which originate in Pennsylvania. This site has a remaining capacity of 85,800 tons.

g. Kinsley Landfill—a 67.3 acre site located in Deptford, New Jersey, approximately 16 miles from Center City Philadelphia. This site with the M. A. C. site have yearly loadings of 627,000 tons, 531,000 tons of which originate in Pennsylvania (accurate separate figures are not available for these sites). This site has a remaining capacity of 1,000,000 tons.

h. Kramer Landfill—an 88.5 acre site located in Mantua Township, New Jersey, approximately 17 miles from Center City Philadelphia. The loadings at this facility are 253,000 tons, 8,500 tons of which originate in Pennsylvania. This site has a remaining capacity of 260,000 tons.

i. Landfill and Development Company—a 162.8 acre site located in Mt. Holly, New Jersey approximately 26 miles from Center City Philadelphia. This site has yearly loadings of 434,000 tons, 220,000 of which originate in Pennsylvania. This site has a remaining capacity of 1,500,000 tons.

j. M. A. C. Landfill—a 38.9 acre site located in Deptford, New Jersey approximately 16 miles from Center City Philadelphia. For loadings, see Kinsley above. This site has reached capacity but is still operating.

k. Q. T. Landfill—a 6 acre site located in Quinton Township, New Jersey approximately 40 miles from Center City Philadelphia. This site has yearly loadings of 7,045 tons, 7,025 of which originate in Pennsylvania. This site has a remaining capacity of 38,000 tons.

l. Ward Landfill—a 26.2 acre site located in Pennsauken Township, New Jersey, approximately 8 miles from Center City Philadelphia. This site has yearly loadings of 198,000 tons, 139,000 tons of which originate in Pennsylvania. This site has a remaining capacity of 80,000 tons.

m. Warner Company Landfill—a 93 acre site located in Cinnaminson Township, New Jersey, approximately 12 miles from Center City Philadelphia. This site has yearly loadings of 310,000 tons, 213,000 tons of which originate in Pennsylvania. This site has reached its capacity but is still operating.

4. The records of the DEP indicate that two of the four sanitary landfill plaintiffs in the *Philadelphia* case, Fazzio and M. A. C., have reached maximum capacity and, thus, should be terminated. In addition, the Warner Company landfill in Cinnaminson Township, New Jersey, which takes 213,000 tons per year of Pennsylvania waste has reached capacity. Thus, 3 landfills which accommo-

date 53% of the Pennsylvania waste disposed of in New Jersey have reached capacity. Two other landfills, Amadei and Buzby Brothers, have reached maximum capacity but are still operating. Unless the disposal of out-of-state waste is terminated, the Department may be forced to allow these landfills to exceed their capacities and/or approve additional acres for landfilling.

5. The M. A. C. landfill is a 38.9 acre site. M. A. C. has applied to the DEP for approval to increase its height limitation from 34 feet to 68 feet. This application should probably be, but has not yet been, denied because of the existing leachate problem at the site.

6. The Kinsley landfill is a 67.3 acre site. Kinsley has neither filed an application with the DEP for approval of additional landfill acreage or for approval to increase height limitations at its existing site, although informal submissions have been made. If out-of-state waste were to be excluded there would be no present need to increase the landfill acreage or the height limitation.

7. The Fazzio landfill is a 38 acre site. Fazzio has applied to the DEP for approval to landfill an additional 16.5 acres. If out-of-state were to be excluded, there would be no present need to increase the landfill acreage. Moreover, the existing Fazzio site has a serious leachate problem and has reached its capacity. Unless out-of-state waste is excluded the DEP may be forced to allow continued dumping at the Fazzio site. If the Fazzio site is closed and/or the expansion of the site is not allowed, New Jersey communities utilizing this facility could utilize the other New Jersey landfills in the area for disposal with little or no inconvenience or economic hardship. However, on information and belief, some of these communities dump for little or no charge at the Fazzio landfill.

8. A typical sanitary landfill in New Jersey has an area much less than 200 acres. For example, of the 13 landfills which currently accept Pennsylvania waste for disposal, none are 200 acres—7 of the sites are less than 50 acres, 5 of the sites are between 50 and 99 acres, and only one is over 100 acres.

9. On November 21, 1975, I visited the offices of the State of Pennsylvania, Department of Environmental Resources ("DER"), the agency responsible for solid waste administration, in Harrisburg, Pennsylvania. The purpose of my visit was to review the records maintained by the Department of Environmental Resources with respect to solid waste facilities in Pennsylvania to discuss same with DER representatives. On December 3 and 4, 1975, at my direction an employee of my Bureau again visited the DER offices in Harrisburg for further review of the DER records and for further discussion with DER representatives with respect to solid waste facilities in Pennsylvania. While I was at the DER, I was given copies of the following documents:

1). A paper written by Commissioner Damiano entitled "Feasibility Considerations for Establishing a Resource Recovery and Energy Recovery Program" dated November 22-24, 1975

2). A Paper written by Commissioner Damiano entitled "An Urban Solid Waste Strategy for Philadelphia" dated September 8, 1975

3). "A Plan for Solid Waste Management in Pennsylvania" dated June 1970 prepared by the Commonwealth of Pennsylvania, Department of Health (pps. 102-103 only are included herewith)

4). A DER summary of Philadelphia's efforts with respect to developing a solid waste plan.

5). A DER map showing permitted disposal sites in Pennsylvania within a 150 mile radius of Center City Philadelphia.

Said documents are attached hereto as Exhibits "A" through "E" respectively.

10. The records of the DER reveal that within Pennsylvania there are 8 sanitary landfills in a 50 mile radius of Center City Philadelphia capable of accommodating the amount of solid waste currently generated in Pennsylvania and now being disposed of in New Jersey landfills. Those landfills are:

a. Warner Company—a 62 acre site located in Falls Township, Pennsylvania, approximately 25 miles from Center City Philadelphia with a remaining capacity of 2,000,000 tons. Current loadings are 260,000 tons per year.

b. Francis Cloud Landfill—a 43 acre site located in Lower Oxford Township, Pennsylvania, approximately 40 miles from Center City Philadelphia with a remaining capacity of 275,000 tons. Current loadings are 1,300 tons per year.

c. Novak Landfill—a 60 acre site located in Allentown, Pennsylvania, approximately 40 miles from Center City Philadelphia with a remaining capacity of 800,000 tons. Current loadings are 2,900 tons per year.

d. Western Berks Refuse Authority Landfill—a 41 acre site located in Shillington, Pennsylvania approximately 50 miles from Center City Philadelphia with a remaining capacity of 375,000 tons. Current loadings are 46,800 tons per year.

e. Pottstown Disposal—a 65 acre site, 22 acres of which are presently approved by DER, located in Pottstown, Pennsylvania, approximately 35 miles from Center City Philadelphia with a remaining capacity of 800,000 tons. (This does not include the potential capacity of the unapproved site.) Current loadings are 60,000 tons per year.

f. Chren Brothers Landfill—a 13 acre site located in Easton, Pennsylvania, approximately 35 miles from Center City Philadelphia with a remaining capacity of 386,000 tons. Current loadings are 78,000 tons per year. In addition, there is an application pending with the DER to landfill an additional 50 acres. Using Mr. Peluso's figures (Psa 22-35), this site, if approved, could accommodate 10,000 tons per week of solid waste for 3¾ years. The information with respect to the pending application was obtained in a telephone conversation with a representative of the landfill.

g. Berks Landfill Corporation—site located in Sinking Spring, Pennsylvania, approximately 45 miles from Center City Philadelphia with a remaining capacity of 5,000,000 tons. Current loadings are 255,000 tons per year. [1]These figures were obtained in a telephone conversation with a representative of the company. The representative stated that they could double their current loadings with no problem.

h. Lanchester Corporation Landfill—an 85 acre site located in Honey Brook, Pennsylvania, with a remaining capacity of 4,000,000 tons. Current loadings are unavailable.

11. The records of the DER also reveal that a permit has been issued to the Strasburg Corporation to operate a

50 acre sanitary landfill in Newlin Township, Chester County, Pennsylvania. The site, located approximately 40 miles from Center City Philadelphia, has been approved, but is not yet operational. Using the figures in Mr. Peluso's affidavit (Psa 22-35), said site could accommodate 10,000 tons per week of solid waste for 3¾ years. I am aware of no reason why the City of Philadelphia could not utilize this site for disposal of its solid waste. While at the DER, I was informed that there are two currently operating but unapproved landfills within a 50 mile radius of Center City Philadelphia, Grand Central Landfill located in Northampton County, and F R & S located in Berks County. On information and belief these landfills could accommodate some of Philadelphia's solid waste.

12. Based on the review of the information available to us at the Pennsylvania DER and my conversations with Pennsylvania landfill operators, it is my opinion that there is sufficient landfill capacity in Pennsylvania within a 50 mile radius of Center City Philadelphia to accommodate the amount of Pennsylvania solid waste currently being disposed of in New Jersey landfills. Accordingly, if out-of-state solid waste can no longer be disposed of in New Jersey, it would not be necessary for Philadelphia to allow its solid waste to pile up on its streets. In addition, at the time P. L. 1973, c. 393 was to have gone into effect the DER developed an emergency plan to handle Pennsylvania solid waste being disposed of in New Jersey. On information and belief that emergency plan included a "gentleman's agreement" with the landfills in the surrounding Pennsylvania counties to accommodate Philadelphia's solid waste. Any difficulties which may be encountered in accommodating Philadelphia's waste in these landfills would not be due to lack of physical capacity but would be of a legal nature.

13. Based on the review of DER records and conversations with representatives of some of the 8 landfills in Pennsylvania, it is my opinion that these 8 sites have an estimated remaining capacity of 13,636,000 tons. This estimate does not include the potential for going higher on existing sites, changing the slope requirements on existing sites, or the approval or utilization of additional acreage. Based on DEP records, the 13 New Jersey landfills which currently accommodate Pennsylvania waste have a remaining capacity of 2,340,800 tons.

14. The maximum side slope permitted in Pennsylvania landfills is 15%, while the maximum side slope allowable in New Jersey landfills is 50%. If Pennsylvania's side slope regulations were relaxed or amended vast amounts of additional solid waste beyond the loadings indicated above could be accommodated in *existing* Pennsylvania landfills. In addition, the records of the DER reveal that the Montgomery County Landfill, which has an operating site which is close to capacity located in Upper Merion Township, Pennsylvania, approximately 17 miles from Center City Pennsylvania, intends to file shortly an application with the DER for a second site, adjacent to its existing site. The new site would be an adjacent quarry pit 1100 feet long by 900 wide by 130 feet deep with an estimated capacity of 2,380,000 tons. Again, using Mr. Peluso's figures, this site could accommodate 10,000 tons per week of solid waste for 4 years and 7 months.

15. The records of the DER reveal that the City of Philadelphia does not own or operate any sanitary landfills for raw solid waste and that the City of Philadelphia has never applied to the DER to own or operate a sanitary landfill. The records of the DER further reveal that the City of Philadelphia has included New Jersey sanitary landfills as a part of its solid waste management plan approved by the DER in October of 1975.

16. In an emergency situation, a sanitary landfill can be operational within 4 to 6 weeks from approval, depending upon the number and type of improvements which have to be made prior to commencing dumping operations. There is sufficient suitable land for sanitary landfill purposes in Pennsylvania within 50 miles of Center City Philadelphia on which sanitary landfills could be operated. See "A Plan for Solid Waste Management in Pennsylvania", Commonwealth of Pennsylvania, Department of Health (June 1970), portions of which are attached hereto as Exhibit "C". I know of no reason why the environmental and engineering problems associated with the commencement and operation of the sanitary landfills or in going to higher elevations on existing landfills would be any more difficult in Pennsylvania within a 50 mile radius of Philadelphia than they would be in New Jersey.

17. Representatives of the DER informed me that the City of Philadelphia's current rail haul proposal for solid waste is its eighth attempt at such a project since the late 1960's. The other rail haul projects were unsuccessful because Philadelphia could not secure the approval of the governmental officials in the proposed recipient counties.

18. I am aware of at least 4 companies that manufacture 65 cu. yd. transfer tractor-trailer solid waste vehicles. Either I or members of my staff have conferred by telephone with these companies and have received the following information:

1. Cobey Waste Control, Galion, Ohio

weight of the trailer	24,000 lbs.
maximum load	80,000 lbs.
cab (separate item)	18,000 lbs.
	122,000 lbs.

this firm could deliver 5 trailers within 90 - 120 days

2. Dempster Dumpster, Knoxville, Tennessee

weight of the trailer	24,500 lbs.
maximum load	40,000 lbs.
cab (average)	18,000 lbs.
	82,500 lbs.

This firm could deliver 5 trailers within 30 days and 50 trailers within 120 days

3. Heil Company, Milwaukee, Wisconsin

weight of trailer	23,000 lbs.
maximum load	100,000 lbs.
cab (average)	18,000 lbs.
	141,000 lbs.

This firm could deliver 5 trailers within 75 days

4. Peabody Company, Peabody, Ohio

weight of trailer	25,000 lbs.
maximum load	50,000 lbs.
cab (average)	18,000 lbs.
	93,000 lbs.

This firm could deliver 4 trailers per week starting anytime.

19. At the present time, the only viable method of solid waste disposal that exists in New Jersey is through sanitary landfills. Thus, sanitary landfills are necessary. However, even though they are necessary, they are, at best

a necessary evil. Sanitary landfills are a vast improvement over former open and often burning dumps and polluting incinerators. But sanitary landfills have environmental problems all their own. In New Jersey, virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases including methane, the same "natural" gas used in cooking and heating. It was once believed that solid waste could be used to make swamps into good, usable lands. Examination of terminated landfills reveal that their use for building purposes is not desirable due to the high cost of required pilings and gas accumulation prevention measures. The environmental insults resulting from sanitary landfills demand that the number, size and height of landfills be held to a minimum until such time as viable alternative methods are developed and implemented.

SWORN to and subscribed before me this 8th day of December, 1975.

BERNHARDT V. LIND
Bernhardt V. Lind

MARK L. FIRST
Attorney at Law
State of New Jersey

Exhibit "A".

CITY OF PHILADELPHIA
DEPARTMENT OF STREETS

FEASIBILITY CONSIDERATIONS FOR ESTABLISHING A RESOURCE AND ENERGY RECOVERY PROGRAM

PREPARED FOR

FOURTH NATIONAL CONGRESS
ON WASTE MANAGEMENT TECHNOLOGY
AND
RESOURCE AND ENERGY RECOVERY

Atlanta, Georgia
November 12-14, 1975

David J. Damiano
Commissioner
Streets Department

Feasibility considerations for establishing a resource and energy recovery program . . . marketing, economics, technology, administrative

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The fundamental problem faced by an urban area is to identify viable energy recovery opportunities. There is no substitute for professional engineering investigations and planning. However, I have yet to meet the municipal manager who is not deluged by myriads of proposals from self-appointed experts, salesmen, politicians, contractors, charlatans, whose problems are solved by signing on

the dotted line. The cardinal rule to follow is that the advice is worth the price paid for it! Nothing!

Philadelphia's approach to energy recovery dates to 1961 when the sixth municipal incinerator plant was under final engineering design. One option was an incinerator boiler unit to produce steam and sell to an adjacent Philadelphia Electric power plant ¼ mile away. The cost study including operation and capital amortization was 71¢/1,000 lbs. of steam as compared to fossil fuel of 55¢/1,000 lbs. which resulted in abandoning the concept at that time.

More recently the Penna. Dept. of Environmental Resources partially funded a $60,000 Resource Recovery or Energy Recovery Study. Recognizing that the recent energy crisis has made solid waste competitive as a substitute fuel, a renewed interest has developed to identify markets for steam or energy.

The first phase of our Resource Recovery Study was evaluation of six refuse-to-energy options which was a result of prior investigations and were prepared to be implemented. These opportunities were rank ordered in technical-economic feasibility, interest of the energy and/or steam consumer, time phasing with our refuse disposal needs, ability to integrate with the logistics of our system.

The second phase is a survey to identify new markets for energy or steam as well as R. D. F. preparation as a fossil fuel substitutes. However, although studies of markets are continuing capitalizing on present opportunities is a prudent course for cities to follow. One such opportunity is an existing center-city steam loop, owned and operated by Philadelphia Electric Company, serving five square mile area of downtown Philadelphia. Customers include department stores, office buildings, hotels, apartment houses, 13 major hospitals, two universities, two

newspaper plants, and most of the federal, state, and city properties in this area. In addition to space heating, this steam is used for numerous process requirements and for air-conditioning. The load varies from 2,500,000 lb./hr. in the winter to roughly 500,000 lb./hr. in the summer, thus providing a year-round market. All of the steam is generated in oil fire boilers, and 300,000 to 500,000 lb./hr. of new oil fired capacity is anticipated to be required by 1978 or 1979. Philadelphia's energy conservation project proposes to substitute a refuse fired boiler plant for the Philadelphia Electric planned new oil fired facility. The refuse fired energy conservation plant proposed consists of a modern, aesthetically designed building completely enclosing the required refuse receipt and storage facilities, four, 400 tons per day furnaces and their ancillaries. The energy plant is geared to steam demand requirements of the Philadelphia Electric steam loop, details of which are being developed with Philadelphia Electric. This partnership is a unique situation involving a major urban area and its utility company.

The alternatives available for reliable production of refuse derived steam have been narrowed to the most feasible, based on current and emerging technology, which can be easily implemented without waiting for technological developments. This concept involves furnaces of waterfall construction for direct combustion of received refuse on a mechanical grate system providing useful low pressure steam. Each furnace unit will have comprehensive air pollution control systems consisting of a conditioning tower, electrostatic precipitators, induced draft fan, and stack. Provision will be made for recovering ferrous material from the residue and its sale to scrap industry.

Some of the developments in Phase I that surface as criteria may be of interest to other cities.

1. In addition to the market opportunity, one of the essential ingredients in developing a successful refuse-to-energy program, is to have an interested, willing, and cooperative customer. Both the President and staff of Philadelphia Electric Company have extended themselves to the fullest in analysis, data, planning and programming the project. Their singular effort and commitment to the refuse-to-energy project is the most important factor contributing to its success.

2. Refuse collection and disposal being the second highest municipal expenditure, the City cannot afford to subsidize alternate systems or processes. Initial studies of our system and anticipated income from steam sales indicate the project is self-sustaining and/or a savings will result attributable to the reduction of our present disposal costs.

3. The impact of this facility on refuse collection requires no major changes in scheduling, routing, and transfer location making it very favorable from a sanitation operations point of view. Therefore, we will not face any additional collection costs to take advantage of this opportunity.

4. Time phasing is a three to five year term to provide on line steam to the customer and is the normal time period for engineering study, design, and construction for public works facilities to obtain the optimum bid and construction costs. No unnecessary costs will be found for time phasing the on line steam demand.

5. Competent technical consulting engineering services with particular expertise in refuse-to-energy systems is essential. In addition to technical-economic feasibility of each refuse-to-energy project, the consultants sensitivity to systems, reliability, performance, legal, contractual,

financial, requirements are some factors which constitute part of the overall project.

6. One of the most important factors in a refuse-to-energy project is siting. In urban areas, land is scarce. In this case, an abandoned railroad yard is conveniently located within a ¼ mile of the steam loop of the center-city business district of the Philadelphia Electric Company. There is sufficient land area to site the plant with suitable access and egress for refuse collection trucks and trailers from an expressway. Little or no change will take place with the traffic pattern in adjacent neighborhoods, an important factor to community acceptance.

7. The benefits of the Philadelphia Electric Company's refuse-to-energy project are:

Conservation—Energy conservation; refuse being substituted for oil, conserving an estimated 630,000 barrels per year, roughly equivalent to 30,000 domestic oil heated homes per year. This is enough oil saved to provide heating requirements for 100,000 people or 5% of the City's population.

Economics—A potential reduction in refuse disposal costs of 10% from $10/ton conventional method to $9/ton.

Environmental—Reduction in air pollution in critical center city location of Philadelphia's basin and in land requirements for refuse disposal.

Employment—Underprivileged low income residents facing 14% unemployment crisis, will have an additional 100 jobs of higher skill and training opportunities available to them.

Uniqueness—Demonstrate a government-utility partnership acting with one another in the consumers' interest.

Urban Crisis—Independent of social and educational programs, the urban crisis that is faced is a fiscal dilemma. The second highest municipal expenditure is refuse handling and disposal. Future costs are escalating at an unprecedented rate. This project will affect 30% of the total refuse disposal budget of the City.

Timeliness—Energy crisis has demanded exploration of new opportunities for energy conservation. This is reflected in the Federal Energy Program and the Energy Research and Development Agency Program and policies. The Philadelphia Program offers an immediately implementable energy conservation measure which does not require a decade or more of research to become useful to the customers of our urban area.

The preliminary investigations of the aforementioned seven points is more than ample incentive for the City of Philadelphia to pursue a refuse-to-energy project. The subsequent steps are the traditional final engineering design, bid, construction, and operation of the facility. However, several unique considerations in the implementation phase should be elaborated on for the guidance and information of other cities.

1. Contract for steam sales. Terms and conditions for contract with the customer Philadelphia Electric Company will be fully developed and executed before any major capital commitments are made. Contract must address a term of 25 years, rate structure with percentage credits of fossil fuels, capital facilities credit, base load demand, peak load demand, summer/winter load with appropriate guarantees and penalties for consumer protection shall be developed.

2. With capital requirements in excess of $50 million, this is beyond the normal financing capability of the City. New institutional arrangements, via utility, authority or

alternate form of a public agency must be investigated to carry out project. Concurrently an I. R. S. ruling will be pursued to take advantage of an unique private/or authority arrangement to benefit the investment tax credit and accelerated depreciation for the eligible components of the facility and the low cost financing through bonds for a public agency. It is possible to realize an interest rate in five to eight per cent range for financing capital cost of this facility.

3. A unique approach saving time, construction cost, an unnecessary duplication of efforts from the conventional specification bid and construction routine will be employed. It is commonly known that the incinerator-boiler furnaces and appurtances constitute some 45% of the total construction cost and the building enclosure is normally tailored to fit the equipment manufactured. The unique approach to be employed will be prior to final engineering building design, the pre-purchase of incinerator-boiler equipment on performance specifications will be made directly from the manufacturer.

With known equipment and manufacturer and supplier, the consultants will then be directed to proceed with final building design of the supports and enclosure around details furnished by manufacturer.

The successful bids by the building contractor will stipulate installation of the equipment pre-purchased by the City to be furnished and installed concurrent with the building and mechanical trades contracts.

This will result in an overall savings in time and costs to the City and a more efficient installation.

4. In conclusion, to demonstrate the confidence level and cooperation in a unique government-private utility arrangement, an agreement was reached to carry out the next phase of this project. The $400,000 in design and

engineering funds to move the project to the next stages of completion will be shared equally between the City of Philadelphia and Philadelphia Electric Company. This reinforces the point made in the beginning of our discussion where the most important ingredient is a successful refuse-to-energy project is an interested, willing and cooperative joint venture by the government and the customer.

Exhibit "B".

CITY OF PHILADELPHIA
DEPARTMENT OF STREETS

AN URBAN SOLID WASTE STRATEGY FOR PHILADELPHIA

PREPARED FOR

DEPARTMENT OF ENVIRONMENTAL RESOURCES
Harrisburg, Pennsylvania

September 8, 1975

DAVID J. DAMIANO
Commissioner
Streets Department

AN URBAN SOLID WASTE STRATEGY FOR PHILADELPHIA

The City of Philadelphia is a major historical, cultural, educational and medical center for some two million residents in a 129 square mile area. Municipal solid waste generation is roughly 1,000,000 tons per year with a comparable amount of commercial and industrial waste privately.

Philadelphia's urban strategy for solid waste management is a rigorous one. Faced with required conformance to a municipal air management code and Pennsylvania's Solid Waste Management Act 241, spiralling waste generation, increased fuel costs and energy consumption, rapidly diminishing surface disposal space including New Jersey's refuse importation litigation, and public insistence on resource conservation and recovery, the City has had

to marshall its forces—technical, financial, political and administrative—in urgent response. Resultant efforts have involved Federal and State government, technical consultants, and private sector industry in a unique multi-party cooperative setting. Out of this, concerted action to develop efficient, economic, and environmentally-sound short and long-range plans for Philadelphia solid waste management has evolved.

Philadelphia currently incinerates 350,000 tons per year of refuse and landfills 650,000 tons per year. Two modern, continuous-feed 750 ton per day municipal incinerators operate; recent tests show both of these installations easily satisfying Federal incinerator guidelines since being retrofitted with advanced electrostatic precipitators. The City also maintains four batch-fed incinerators which are being overhauled as refuse transfer stations; conversion is 90% complete. These facilities presently process roughly 2000 tons per day of refuse.

The City uses two New Jersey disposal sites, one in Deptford Township and one in Mt. Holly. Of the ten-year, 1000-ton per day service contracts the City has at both sites, roughly nine years remain.

The 1968 passage of Pennsylvania's Solid Waste Management Act 241 required cities and counties across the state to prepare solid waste management plans. Two years later Philadelphia's Streets Department engaged consultant services to assist in the City's $250,000 plan. This marked the beginning of recent future-oriented solid waste planning activity in Philadelphia.

Subsequent action has been taken on several major fronts.

RAIL HAUL OF SOLID WASTE.

All solid waste processing systems leave some irreducible residue requiring disposal. Sanitary landfilling,

the one total disposal method, is predicated on the availability of suitably-zoned land area. The scarcity of such land is a problem besetting Philadelphia and many other major urban centers across the country.

Up until 1971 the City deposited raw refuse and incinerator residue at seven local land disposal sites. Most of these sites have since been completed, sold, or ordered to close. The need for alternate municipal disposal options was underscored when in 1973 New Jersey's legislature passed a law banning out-of-state refuse importation. A joint appeal by New Jersey landfill operators, USEPA, and the City of Philadelphia succeeded in revoking the law as unconstitutional interference with interstate commerce. The urgent need for land disposal sites remained however. The City looked to its rail haul project.

Philadelphia rail haul was first conceived of during the late 1960's. At that time the rail transport of municipal solid waste to the anthracite coal regions of Pennsylvania was planned as a private enterprise venture. It was defeated, however, by public opposition.

In 1972 the Streets Department applied for a $6 million Rail Haul Demonstration Grant in national competition and was awarded $500,000 in preliminary funds. The purpose of the grant was to demonstrate the technical, economic, and environmental feasibility of solid waste rail haul for the reclamation of remote abandoned strip mines. Originally conceived of as a government-to-government system (i.e., with governmental agencies handling all phases of operation except actual rail transport), the Pennsylvania Land Restoration Task Force was formed composed of USEPA, the Pennsylvania Department of Environmental Resources (DER), the City of Philadelphia, and its engineering consultant, Leonard S. Wegman Co. Inc. Twenty-seven Pennsylvania counties were considered for strip mine disposal. When public referendums proved

the government-to-government approach untenable at that time, private enterprise involvement in the Demonstration Project was intensified. The private sector appeared capable of executing such a system and in addition, owned and operated much needed disposal space.

A prequalification stage ensued with public notice placed in local and national newspapers to maximize exposure to the private sector. This advance solicitation required capability on the contractors' part of rail hauling a minimum of 1000 tons per day of solid waste furnished by the City of Philadelphia, on a continuous basis for up to 20 years to a remote disposal site. Ancillary requirements included:

1. Union agreement to operate in the event of a rail strike.
2. Local transfer to a railroad siding.
3. Rail access from Philadelphia to the disposal site.
4. Pennsylvania Department of Environmental Resources Module I approval towards an operating permit for the site.
5. Local and county government approvals.
6. U. S. Bureau of Mines approval, where applicable.
7. Evidence of ownership or control of the site.
8. Right to use the site as a landfill.
9. Proper site zoning.

Prospective bidders were required to have experience in the operation of a sanitary landfill of 1000 tons per day or more and a mechanized transfer station of 500 tons per eight hour day or more; and technical and management capabilities in solid waste projects of comparable scope and magnitude. The City's Standard Questionnaire and Financial Statement were also included.

The successful prequalification of Browning-Ferris Industries, Waste Management, Inc. and Waste Resources Inc. was officially announced in April 1975. The Task Force is currently assisting prequalifiers with their respective bid packages. System performance specifications are being developed by the Leonard S. Wegman Company. Bid advertisement is scheduled for September 1975.

A unique public/private financing arrangement characterizes the Rail Haul Demonstration Project. Under a recent Internal Revenue Service ruling, Philadelphia secured access to a leveraged-leasing option whereby both the City as lessee and a financial intermediary as lessor provide capital funds toward facility purchase. With a financial intermediary (corporation or individual) interposed between the long-term source of capital and the City, lower long-term capital and interest costs can be realized by the City. At the same time, the financial intermediary purchases the tax advantages of ownership—investment depreciation and a substantial tax credit if the facility is run by a private corporation. Both parties benefit via this optimal financial arrangement.

CONVERSION OF REFUSE TO ENERGY.

Philadelphia's commission of a refuse energy recovery feasibility study signalled another phase of the City's comprehensive study of solid waste management. The Leonard S. Wegman Co. Inc. was retained as the City's technical consultants to perform this in-depth analysis of contemporary energy recovery alternates.

Engineering evaluations were made of several major thermal conversion systems including prepared refuse as a supplementary fuel, mass burning of raw refuse with steam recovery, pyrolysis, and specific proposals prepared and presented to the City by several of America's largest in-

dustrial organizations. The study scope also encompassed sewage sludge disposal and the potential impact of refuse and residue output from energy recovery plants on the Rail Haul Demonstration Project.

The plan recommended by the Wegman firm superimposes a new, modern 1600 ton per day thermal conversion facility on the City's current program of upgrading its continuous-feed incinerators and converting four batch-fed incinerators into transfer stations. An extraordinary opportunity exists for siting such a refuse-to-steam conversion plant within the City where direct tie-in to the Philadelphia Electric Company's (PEC) business district steam loop can be made.

This plan together with other components of the City's disposal program would provide for the disposal of some 15,000 tons per week of Philadelphia's refuse, roughly corresponding to the actual amount collected by City forces. Railyard siting also allows rail haul of recovered materials to secondary markets and residue to remote landfills. In addition a rail transport system for raw refuse represents an interim measure until an energy recovery system comes on stream.

The recommended energy recovery plant is an aesthetically designed structure completely enclosing all refuse receipt and storage facilities, four 400 ton per day furnaces and ancillary equipment. The furnaces are to be of waterwall construction for direct combustion of as-received refuse on continuous-feed grate systems to provide useful low pressure steam. Each furnace unit will be equipped with a comprehensive air pollution control sequence including conditioning tower, electrostatic precipitator, induced draft fan and individual clarified gas effluent stack. Provision will also be made for recovering ferrous from residue for sale to the scrap industry.

Philadelphia is currently evaluating the proposed implementation of this project. Private sector services would be required for all major construction and equipment procurement and installation phases. A financing mechanism similar to that developed for the Rail Haul Demonstration Project is also being prepared to benefit both municipal and private sectors. The next project phase involves a City/PEC joint venture to determine specific engineering and economic parameters relating to eventual design of the energy plant.

MARKETING OF RECOVERED MATERIALS.

Successful long-term marketing of commodities separated and converted from waste is necessary to close the recovery cycle. Philadelphia has received a grant from the Department of Environmental Resources to conduct a study of the marketability of energy and materials recovered from municipal refuse. This investigation is to consider fuels, steam, electricity, paper, metals, glass, plastics, rubber, wood and compost. Topics of study include potential markets for recoverables, competitive products and supplies, advantages and disadvantages of recoverables versus established products, current market volumes, haul costs to potential customers, process changes required for the sale of recoverables, prevailing scrap prices, potential market displacement and market growth outlook.

This effort will require extensive contact with the private sector. Local, regional, and national industry will be solicited as potential purchasers of recovered materials. Concurrently, utilities, industries, public and private institutions and other major energy consumers will be directly involved in the investigation of markets for refuse-derived energy.

One such prospective buyer already identified is the Department of the Navy. The City has recently conferred

with the Naval Facilities Engineering Command regarding a project to provide processed solid waste fuel to their Shipyard power plant in Philadelphia. The system envisioned by the Navy would yield a long-term supply of economical fuel for their power plant while providing a dependable, low-cost disposal method for a significant portion of total City refuse. This plan would also further the causes of resource and energy conservation and environmental protection—while exemplifying progressive multipartite collaboration. Initial discussions have called for total project financing and facility construction and operation by the Navy's selected contractor. There would be no obligation of Navy funds other than for the final purchase of refuse-derived fuel. Philadelphia and the Navy could contract directly for refuse supply rather than the City dealing with the Navy's contractor.

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THE ROLE OF PRIVATE ENTERPRISE

The magnitude and complexity of contemporary urban waste management requires unprecedented municipal sophistication. The ever-increasing generation of waste in our consumer-oriented society has left collection and disposal technology far behind. The need for innovative, long-range planning to accommodate the environment—both physical and fiscal—within which municipalities operate is only now being addressed. Philadelphia's comprehensive strategy represents one such approach.

The emergence of private, stockholder-owned companies in the municipal refuse field is a new and important development. The private sector often maintains legal, financial, and managerial capabilities surpassing those available within current municipal settings. Privately-owned companies are increasingly demonstrating success

in performing the traditional local government operations of solid waste collection and disposal.

With private enterprise involvement a key to the success of large-scale recovery endeavors, the maintenance of effective communication channels between sectors becomes essential. Where the mutually-beneficial nature of secondary recovery and marketing efforts is recognized, cooperative collaboration between City and private sector can be enhanced. In such a manner can Philadelphia and other urban areas most effectively manage and make productive use of their solid waste.

Exhibit "C".

EXCERPT FROM
A PLAN FOR SOLID WASTE MANAGEMENT
IN PENNSYLVANIA

Commonwealth of Pennsylvania
Department of Health
Bureau of Housing and Environmental Control
Solid Waste Section

Solid Waste Publication 3

June 1970

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2 – PHILADELPHIA METROPOLITAN REGION

Bucks, Chester, Delaware, Montgomery and Philadelphia Counties

Five counties, a 20th of the Commonwealth's area, contain a third of its people. Philadelphia Metropolitan Region in southeastern Pennsylvania, economic leader of the Commonwealth, is the source of 37 percent of the State's personal income, 35 percent of the real property income, 41 percent of assets in financial institutions. Its 3.9 million population represents the greatest concentration of people in the State, a density exceeding 16,000 per square mile in its center.

The City of Philadelphia is the region's population center. The region is the nation's fourth largest manufacturing center and its diversity is illustrated by the fact that there are more than 100 companies in 15 of the 20 classifications frequently used to identify industries. This region has been the State's fastest growing area in population. Montgomery, Delaware and Bucks Counties have nearly doubled in population size since 1950.

Within this region, there are 3,909,515 people who live in 236 municipalities. These 236 municipalities include three cities that have 58 percent of the people, 88 boroughs which house 11 percent, 28 first class townships with 13 percent and 117 second class townships which have 18 percent of the people.

Solid Waste Survey Information

The Philadelphia Metropolitan Region discards approximately 6.74 million tons of solid waste in a year.

On-site storage of solid waste is not regulated by an official agency for 32 percent of the population in the region. Of the remaining 68 percent, 27 percent of the people have their solid waste storage practices regulated by health agencies, 30 percent by police agencies and 43 percent by other types of municipal agencies. These figures indicate that on-site storage of solid waste has been a very neglected portion of this region's solid waste management system.

Seventy-four percent of the people are served by municipalities that have jurisdiction over their collection systems, either by ordinance or contract. The collection of household solid waste is performed by private collectors for 48 percent of the population. Five percent of the households handle their own waste and 47 percent have their's collected by public collectors.

Commercial refuse is collected by private collectors at 80 percent of the stores. Public collection accounts for 14 percent of the commercial waste and the other six percent is taken to the disposal site by the individual store owners. There are 366 scrap and salvage yards within the region and 22,213 abandoned vehicles were collected

in a year. There were 3,603,334 tons of solid waste collected in one year. The source of the waste was as follows: household, 1,402,573 tons; commercial, 233,925 tons; combined household and commercial, 1,111,524 tons; with the remaining 855,312 tons coming from other sources. The funds budgeted to collect this waste were $21,955,441.

The disposal of solid waste in the region is approximately two-thirds by land disposal and one-third by incinerator. Backyard burning is a volume reduction method which is tolerated in 55 percent of the municipalities. However, 86 percent of the communities do have ordinances controlling but not necessarily prohibiting this practice. Fifty-one percent of the municipalities have commercial, industrial, institutional and agricultural businesses which burn solid waste on their premises and 86 percent of these have ordinances governing this practice. There are 151 promiscuous dumps in the region.

Approximately 55 percent of the 56 organized land disposal sites are operated by municipalities. However, only 49 percent are owned by them. The remaining landfills are privately owned and operated. The average compliance rating with the State established rating system for sanitary landfills is 52 percent. Air pollution is caused by 52.9 percent of the sites and 23.5 percent contribute to water pollution. The water pollution problems are generally due to poor location from a soil and geological standpoint. Presently, $6,800,815 is budgeted for disposal in the region.

Soil Suitability For Sanitary Landfill

The Philadelphia Metropolitan Region has a higher percentage of soil which is suitable for the normal sanitary landfill operation than any other region in the State. The region is 2,183 square miles in area and 32 percent of

the soils are suitable for sanitary landfill. Although 700 square miles are suitable, only 440 square miles are in areas which are not presently used for industrial, commercial or residential purposes.

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These soils are also the soils of choice for all types of construction, recreational and agricultural uses. Therefore, the competition for this land is very keen.

Industrial Solid Waste

The Philadelphia Metropolitan Region contains 6,197 manufacturing and agricultural industrial establishments. All together, they produce more than 2.8 million tons of waste per year. The region's industries are diversified without any one dominating the picture. The following is a breakdown of the waste produced in eight of the 20 Standard Industrial Classifications.

Industry	Tons/Year
(1) Machinery, Except Electrical	307,800
(2) Apparel and Related Products	26,200
(3) Electrical Machinery, Equipment & Supplies	35,720
(4) Food & Kindred Products	186,000
(5) Fabricated Metal Products	136,000
(6) Chemical & Allied Products	61,600
(7) Printing, Publishing & Allied Products	6,060
(8) Instruments & Related Products	2,970

Although the region occupies only five percent of the land area in Pennsylvania, it has about one-third of all the

industries. With the number of diversified industries in the region, the recycling of waste products should become a reality within the near future.

Action Groups For Solid Waste Management

There are two refuse authorities in this region, both located in Chester County. West Chester Authority operates a landfill to serve the Borough of West Chester and six surrounding townships. The site serves approximately 30,000 people. Each of the authority members has passed an ordinance requiring that refuse generated within its boundaries be disposed of at the Authority Landfill. The Southeast Chester County Refuse Authority is comprised of eight municipalities with a population of approximately 20,000. Refuse generated within the member municipalities is disposed of at the Authority Landfill but non-member municipalities are also allowed to use the site for disposal.

Delaware County organized a County Solid Waste Disposal Department in the late fifties and opened its first incinerator in 1960. The county is now operating three incinerators and will shortly begin construction of a new five million dollar rotary kiln incinerator. Municipal refuse is accepted at the incinerators with no charge. Commercial collections also are accepted but are charged a fee. The incinerators serve 49 municipalities, approximately 600,000 persons. The county is divided into geographical areas with municipalities in each area designated to deliver to a specific incinerator.

The City of Philadelphia also operates a system of incinerators to dispose of refuse generated within the city. At present, six incinerators and three residue disposal sites serve the needs of the city.

Bucks County Natural Resources Division operates a county landfill and has purchased land to include a transfer station in its system. A reduction facility is proposed to be installed at the landfill to improve the efficiency of the entire operation.

Montgomery County has recently assumed responsibility for refuse disposal on a county-wide basis. The county has received a permit to convert a limestone quarry to a landfill. The quarry will be pumped dry, sealed with a membrane rubber base and will be provided with a collection and treatment system for the leachate produced. This site, operated with a system of transfer stations, is expected to serve approximately one-half million people. It is expected to be opened prior to the end of 1970.

Montgomery County had several refuse study groups that have dissolved since responsibility for refuse disposal was assumed by the county.

The Downingtown Regional Study Group is active in Chester County. The group is informally organized but receives the backing of the member municipalities. Its purpose is to gather information and to make recommendations to the seven member municipalities.

The Bucks County Solid Refuse Advisory Board was established in 1967 to study methods of solid refuse disposal. A Master Solid Wastes Disposal Plan for Bucks County was published in 1967. This was prepared by a consulting engineering firm under contract to the County Commissioners.

All of the counties in this region have planning commissions and all are actively preparing solid waste management plans.

Bucks, Montgomery, Chester and Delaware Counties and the City of Philadelphia also are members of the Delaware Valley Regional Planning Commission (DVRPC) to which several municipalities in New Jersey belong. DVRPC is an interstate agency charged with improving

the quality of the environment through a comprehensive program of regional planning.

In 1969, DVRPC contracted with the Fels Institute of Local and State Government, University of Pennsylvania, to survey the solid waste problems of the region.

Exhibit "D".

SOLID WASTE MANAGEMENT PLANNING
PHILADELPHIA CITY

May 1972-March 1973

Development and submittal of the solid waste management plan tasks outlining 14 options including landfilling, railhaul, incinerator, steam generation, and resource recovery.

March 21, 1973

In response to the Department's review of September, 1972, Philadelphia submits additional information regarding waste generation, collection districts, delineation of processing and disposal facilities to be used.

May 17, 1973

In response to the Department's review of April 18, 1973 Philadelphia submits a further breakdown of potential disposal sites and selects the rail-haul option for implementation.

May 30, 1973

In response to a meeting of May 17, 1973 Philadelphia submits additional information regarding disposal of commercial, industrial, and institutional wastes with a schedule for the closure of batch fed incinerators and unsuitable residue sites.

November 16, 1973

In response to the Department's review of August 30, 1973 information regarding hazardous and pathological wastes is submitted.

May 7, 1974

In response to the Department's review of December 27, 1973 regulations for pathological and hazardous wastes are submitted.

August 8, 1974

The Department disapproves Philadelphia's management plan based on the City's inability to implement the rail-haul option.

September 3, 1974

The City appeals the Department's action to the Environmental Hearing Board.

November 7, 1974

In response to the Department's action of August 8, 1974 Philadelphia submits an amendment to the plan selecting an option of upgraded incineration, transfer, and disposal at landfills in Pennsylvania and New Jersey while noting continued efforts at implementation of a limited rail-haul program.

December 14, 1974

In response to the Department's review of November 13, 1974 Philadelphia identifies sites to be utilized with schedule for upgrading of incineration and transfer along with information on capacities of existing and proposed sites.

May 1, 1975

In response to the Department's review of March 17, 1975 Philadelphia details methods of control of collection and disposal of wastes handled by private collectors within the City and provides additional information on sites to be utilized.

September 5, 1975

In response to the Department's review of August 29, 1975 Philadelphia submits an addendum to the plan stating that new contracts for waste disposal will be signed by 1980 for an additional five year period and that insurance of capacity for private haulers for the period 1980-1985 will be accomplished.

October 30, 1975

The Department approves the Solid Waste Management Plan for the City of Philadelphia.

Related Solid Waste Management Planning

June, 1975 - July, 1976

As a supplement to the management plan, the City initiated the development of a solid waste management marketing study for resource recovery which along with attendant studies have identified the following potential markets:

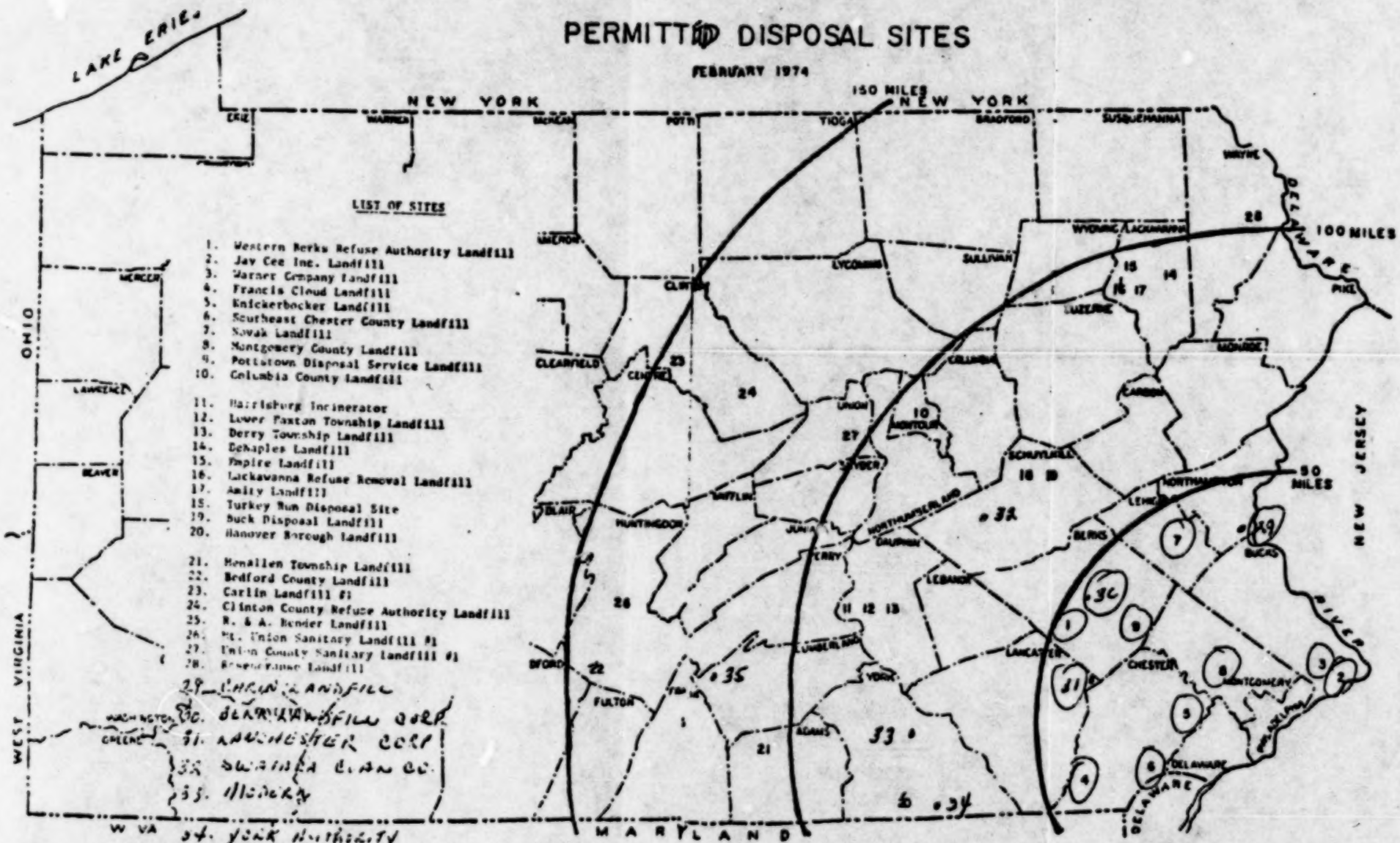
1. Philadelphia Electric Company through a direct tie-in to the business district steam loop could utilize steam from a 1600 ton per day thermal conversion facility.
2. Department of the Navy shipyard power plant in the City for utilization of processed solid waste fuel.
3. Existing industries and secondary materials outlets for utilization of recoverables.

A328
Exhibit "E" to Lind Affidavit

FIGURE 3

PERMITTED DISPOSAL SITES

FEBRUARY 1974



LIST OF SITES

1. Western Berks Refuse Authority Landfill
2. Jay Cee Inc. Landfill
3. Warner Company Landfill
4. Francis Cloud Landfill
5. Knickerbocker Landfill
6. Southeast Chester County Landfill
7. Novak Landfill
8. Montgomery County Landfill
9. Pottstown Disposal Service Landfill
10. Columbia County Landfill
11. Harrisburg Incinerator
12. Lower Paxton Township Landfill
13. Derry Township Landfill
14. Dehaples Landfill
15. Empire Landfill
16. Lackawanna Refuse Removal Landfill
17. Amity Landfill
18. Turkey Run Disposal Site
19. Buck Disposal Landfill
20. Hanover Borough Landfill
21. Menallen Township Landfill
22. Bedford County Landfill
23. Carlin Landfill #1
24. Clinton County Refuse Authority Landfill
25. R. & A. Bender Landfill
26. Mt. Union Sanitary Landfill #1
27. Union County Sanitary Landfill #1
28. Resers Fine Landfill
29. CHRIN LANDFILL
30. BLAIR LANDFILL CORP.
31. LANCHESTER CORP
32. SUSQUEHANNA CLEAN CO.
33. MODERN
34. YORK HAVEN
35. COMMUNITY REFUSE

SUPPLEMENT TO RESPONDENTS' BRIEF.

(November 26, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74
September Term 1974
Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT:

We have just obtained possession of copies of the transcript in the Matter of the Petition of B. Horstmann before the Board of Public Utility Commissioners. A copy of the title page is annexed hereto. In the course of this hearing the principal witness was Bartley R. Carhart. Mr. Carhart was the Project Director on the Commission staff to the County and Municipal Government Study Com-

mission which prepared the publication *Solid Waste: A Coordinated Approach.* Upon direct examination Mr. Carhart acknowledged that he was the author of said document, which is generally referred to as the Musto Report. (See page 217 of the transcript attached hereto.)

During the course of the hearing in the *Horstmann* matter, the Hearing Examiner in considering the admissibility of the report, observed that "hearsay is definitely involved" and that "everybody is aware of the limitations of this report". (See page 233 of the transcript attached hereto.)

This information was brought to our attention yesterday and could not be included in our brief.

Respectfully submitted,

JAMIESON, MCCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation
Attorneys for Plaintiffs-Respondents

By HERBERT F. MOORE
Herbert F. Moore

Dated: November 26, 1975

BOARD OF PUBLIC UTILITY COMMISSIONERS
NEWARK, NEW JERSEY
WEDNESDAY, JANUARY 17, 1973

—

Docket No. 7210-861

In the matter of the petition of B. Horstmann under R. S. 40:55-50 for a determination that the operation of a sanitary landfill in the Township of East Hanover in the County of Morris, New Jersey, is reasonably necessary for the service, convenience or welfare of the public.

—

Docket No. 7210-871

In the matter of the petition of F. William Horstmann's Garbage Dump.

BEFORE EXAMINER LAWRENCE R. CODEY, ESQ.
HEARING EXAMINER

For the Petitioner, appears:
Spinrad, Steinberg & Schwartz, Esqs.
By: Theodore A. Schwartz, Esq.
33 Evergreen Place
East Orange, New Jersey

and

Frederick G. Stickel, III, Jr.
11 Commerce Street
Newark, New Jersey

For Sandoz-Wander, Inc., appears:
Rosen & Weiss, Esqs.
By: Howard T. Rosen, Esq.
and Walter G. Rinehard, Esq.
Gateway I
Newark, New Jersey

• • •

[217]

EXAMINER CODEY: If I may take over for just a second.

Could you just give us your educational background.

THE WITNESS: Yes. I hold a Bachelor and Master's degree in political science, urban problems from Rutgers University.

EXAMINER CODEY: And what is your occupational experience?

THE WITNESS: I have worked since 1968 for this Commission, upon graduating from college.

Q. And you are, in effect, the author of this report?
A. Yes.

MR. STICKEL: I would like to introduce this report in evidence, Mr. Codey. I have brought additional copies here.

MR. INFINITO: We don't know what's in that report to make it in evidence.

• • •

[233]

EXAMINER CODEY: Let's continue with the witness.

MR. IACOPINO: My objection is a little different. Again, we are talking about a man who compiled this report supposedly during '69 and '70 or '70 and '71, I am not sure here, who went to work in '68, and he's talking about something that occurred in '68. It's obviously hearsay and obviously opinions of people who talked to him and there's no way we are going

to know they are valid opinions and it's not the type of testimony this Board should rely on.

EXAMINER CODEY: I will allow the witness to continue and I think everybody is aware of the limitations of this report and of the witness and the fact that hearsay is definitely involved, but for whatever probative value it has, it will become the subject of examination and cross examination by you gentlemen.

• • •

AFFIDAVIT OF STEPHEN WASSERSUG.

(December 5, 1975.)

SUPREME COURT OF NEW JERSEY

Docket No. A-82-74
SEPTEMBER TERM 1974
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

STEPHEN WASSERSUG, of full age, being duly sworn according to law, upon his oath, says:

1. I am Director of the Enforcement Division of the Region III Office of the U. S. Environmental Protection Agency (E. P. A.).

2. In the recent past the City operated four (4) batch fed and two (2) continuous fed incinerators to dispose of solid waste. Investigation by the staff of Region III of the E. P. A. determined that none of these incinerators complied with air pollution emission limitations adopted by

E. P. A., pursuant to The Clean Air Act of 1970 as amended (The Act). On October 3, 1974 the City of Philadelphia entered into a Consent Order with the E. P. A. which required the closing of all four (4) batch fed incinerators and upgrading of the two (2) continuous fed incinerators.

3. Emission data in our enforcement files, submitted by the City in 1974, indicates that the total particular matter emission from the four (4) batch fed incinerators is approximately 3,450 tons of particulate matter per year. Since we consider any point source which emits more than 100 tons per year to be a major air pollution source, we believe that operation of these incinerators can have a significant impact on ambient air quality in the metropolitan Philadelphia interstate air quality region, including the counties of Burlington, Camden, Gloucester, Mercer and Salem in the state of New Jersey.

4. We have been advised by the City that all four (4) batch fed incinerators have been shut down. Subsequent use of these incinerators would be a violation of the above referenced order which was issued pursuant to Section 113 of The Act (42 USC § 1857(c)-8).

5. Since the four (4) batch fed incinerators are quite old it may not be cost effective to upgrade them for the purpose of complying with applicable air pollution standards.

STEPHEN WASSERSUG
Stephen Wassersug

Sworn to and subscribed before me this 5th day of December, 1975.

JAMES B. CORTRIGHT
James B. Cortright, Notary Public
Radnor Township, Delaware County
My Commission Expires May 29, 1978

AFFIDAVIT OF WESLEY E. GILBERTSON.

(December 5, 1975.)

SUPREME COURT OF NEW JERSEY
DOCKET No. A-82-74
September Term 1974
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

COUNTY OF DAUPHIN
COMMONWEALTH OF PENNSYLVANIA } ss.:

WESLEY E. GILBERTSON, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Deputy Secretary for Environmental Protection and Regulation in the Department of Environmental Resources of the Commonwealth of Pennsylvania.

2. There is a statutory mandate in Pennsylvania that all municipalities with a population density of more than 300 inhabitants per square mile must develop a plan for solid waste management to be approved by the Department of Environmental Resources. The City of Philadelphia commenced work on developing a solid waste management plan in 1969. In order to encourage the rapid development of these plans, the State of Pennsylvania does provide financial assistance to the municipalities for the engagement of consultants and other costs incidental to the development of a plan for solid waste management. By May of 1973 Philadelphia had submitted a significant portion of its plan. Since that time there has been a series of conferences and evaluations by Department of Environmental Resources and revisions made in the plan. The final plan for Philadelphia was approved by this Department on October 30, 1975. This plan is basically a long-range program and is not intended to meet emergency conditions.

3. All landfill owners and processing station operators in Pennsylvania must obtain permits from the Department of Environmental Resources. Consequently, this Department has knowledge of the location of landfills in Pennsylvania, their capacities and availabilities to various municipalities throughout the State.

4. The sanitary landfills within a 50-mile radius of Philadelphia do not offer a total solution to Philadelphia's immediate waste disposal problem. I believe that there are significant logistic problems facing Philadelphia in reaching these landfills. The capacity of these landfills is such that they can take but a small portion of Philadelphia's solid waste at the present time.

5. Philadelphia's only other feasible alternative is to open up the incinerators ordered closed by the United States Environmental Protection Agency, Region 3, in the event the restraints on the implementation of New Jersey's statutory solid waste ban are not continued. Use of these incinerators would be in violation of the existing consent order entered into between the City of Philadelphia and the United States Environmental Protection Agency.

6. Without the continuation of the restraints, Philadelphia faces a serious health hazard. Philadelphia's solid waste cannot be adequately disposed of at the present time without the use of landfills in New Jersey.

7. There are sanitary landfills in Pennsylvania presently disposing of solid waste originating in New Jersey. These sanitary landfills are servicing municipalities in New Jersey as well as private haulers in New Jersey who in turn are servicing industrial and commercial accounts in New Jersey.

Wesley E. Gilbertson
WESLEY E. GILBERTSON

Sworn to and Subscribed before me this 5th day of December, 1975.

Richard A. Ragsdale
RICHARD A. RAGSDALE
Attorney at Law of the State of
New Jersey

ORDER DENYING MOTION FOR STAY.
(M-433.)

SUPREME COURT OF NEW JERSEY
M-433 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay and continuation of injunctive relief is denied; and it is further

ORDERED that the order temporarily staying the judgment and injunctive order, entered November 20, 1975, is vacated, effective December 31, 1975.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

Filed: December 11, 1975.

ORDER GRANTING MOTION FOR REMAND.
(M-434.)

SUPREME COURT OF NEW JERSEY
M-434 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC.
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further

ORDERED that this Court does not retain jurisdiction.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

Filed: December 11, 1975.

ORDER DENYING MOTION FOR STAY.
(M-436.)

SUPREME COURT OF NEW JERSEY
M-436 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Movants,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

Filed: December 11, 1975.

ORDER DISMISSING PORTIONS OF PLAINTIFFS' COMPLAINT.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
Docket No. L-15068-73 P.W.
Civil Action

CITY OF PHILADELPHIA, etc, et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

This matter being opened to the Court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs, Herbert F. Moore, Esq. appearing, in the presence of Stephen L. Skillman, Esq., Assistant Attorney General of the State of New Jersey, attorney for defendants, and Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors, and good cause being shown,

It is on this 19th day of December, 1975:

ORDERED, that Counts II, III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII contained in plaintiffs' complaint in lieu of prerogative writs filed in the above captioned matter are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that Counts Two, Three, Four, Five, Six, Seven and Eight of the amended complaint filed by plaintiffs-intervenors in the above captioned matter, are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VIII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter.

GEORGE Y. SCHOCH, J. S. C.

Consent as to form and entry.

JAMIESON, MCCARDELL, MOORE, PESKIN
and SPICER, *A Professional Corporation*
Attorneys for Plaintiffs
By: ARTHUR MEISEL

VINCENT J. DOTOLI,
Attorney for Plaintiff-Intervenors

WILLIAM F. HYLAND,
Attorney General of New Jersey
Attorney for Defendants
By: STEPHEN SKILLMAN
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
MAR 17 1976
MICHAEL RODAK, JR., CLERK

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Appellees,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel and On the Brief.

MARK L. FIRST,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS
AND BRIEF IN SUPPORT THEREOF

Motion to Dismiss

Pursuant to Rule 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

Question Presented

1. Does the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution require a state acting to fulfill its obligation to provide solid waste disposal facilities for its own residents also to provide such facilities for other states?

Counter-Statement of the Case

The crisis in solid waste disposal leading to the enactment of the legislation challenged on this appeal (New Jersey Public Laws of 1973, chapter 363, N.J.S.A. 13:1I-9 et. seq.) is appropriately described in a report submitted to the trial court in support of the State's motion for summary judgment, entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", as follows:

> "In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The

> depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.
>
> "It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.
>
> "Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government

have expressed concern over the scarcity of suitable new sites.

"One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal." (Pa43 to Pa44).*

ARGUMENT

The appellants have not presented a substantial constitutional issue entitling them to appeal, because the decisions of the Court firmly establish that the Commerce Clause of the United States Constitution does not prohibit a State from taking action to prevent the importation of substances harmful to public health and the environment.

The question presented, simply stated, is whether a state may, consistent with the Commerce Clause, seek to deal with a solid waste disposal crisis of substantial proportions by prohibiting the dumping of waste originating outside the state.

The nature of the crisis was stated in emphatic terms by the New Jersey Legislature and the Supreme Court of New Jersey. Section 1 of chapter 363 states:

---

*This notation refers to the appendix filed with the Supreme Court of New Jersey, which was certified to the Court on February 9, 1976.

> "The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." (App. 61).

Similarly, the Supreme Court of New Jersey, referring to its own findings in prior litigation involving solid waste problems as well as taking judicial notice of legislative studies, stated:

> "The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached 'crisis proportions' due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc.* v. *Mayor and Council of the Township of Ocean*, 64 N. J. 190, 193, 314 A. 2d 65 (1974).
>
> • • •
>
> "Compounding the shortage problem are other extremely important environmental considerations. Many existing landfills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in

these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

• • •

"Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw* v. *Byram Township,* 86 N. J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N. J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> '• • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites.'" (App. 33, 35, 47).

These findings must of course be accepted on appeal to the Court unless they lack a reasonable basis in the evidence. *Evco* v. *Jones,* 409 U.S. 91, 94 (1972); *Local Union No. 10* v. *Graham,* 345 U.S. 192, 197 (1952).

The New Jersey Legislature responded to this solid waste crisis by enacting chapter 363, the operative section of which provides:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State." (App. 61-62).

Pursuant to his statutory responsibilities under chapter 363, the Commissioner of the New Jersey Department of Environmental Protection adopted rules and regulations, to become effective concurrently with the statute, which provided:

> "(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
>
> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

> 4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State." N.J.A.C. 7:1-4.2 (App. 96-97).

The combined effect of chapter 363 and the implementing regulation is to prohibit the transportation into New Jersey of waste for dumping in landfills or burning in incinerators, while permitting interstate transportation of waste intended for any productive use, such as resource recovery, energy recovery or reclamation.*

The Supreme Court of New Jersey concluded that this limited restriction on the dumping or incineration of waste, as an emergency measure to cope with the State's solid waste crisis, was not incompatible with the principles of economic union embodied in the Commerce Clause. It said:

> "We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power." (App. 47-48).

* Appellants argue that chapter 363 on its face purports to be a prohibition on the entry of all solid and liquid wastes (except garbage for swine) for any purpose whatsoever. However, the Supreme Court of New Jersey recognized that the statute must be read with the regulations promulgated pursuant thereto prior to its effective date as only applicable to waste destined for disposal. The Court is bound by this interpretation of chapter 363 of the Supreme Court of New Jersey. *Smiley* v. *Kansas*, 196 U.S. 443, 455 (1904).

These conclusions are fully consistent with the leading Commerce Clause decisions of the Court.

The Commerce Clause of Art. 1, Section 8 of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." It is now well established that it not only provides an affirmative grant of authority to Congress but also, even in the absence of congressional action, precludes the states from interfering with interstate commerce. It is equally well established, however, that the Commerce Clause does not require the states to permit the importation of articles which are an inherent threat to public health, safety and welfare and thus a matter of special concern in the exercise of the states' police powers. *Clason* v. *State of Indiana*, 306 U.S. 439, 442-443 (1939); *Sligh* v. *Kirkwood*, 237 U.S. 52 (1915). As the Court stated in *Sligh* v. *Kirkwood, supra*:

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well-

established. Such articles, it has been declared by this court, are not legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. *'Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.'"*

"Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . ." 237 U.S. at 60 (citations omitted) (Emphasis added.)

This principle was applied in *Clason* v. *Indiana, supra,* where the Court upheld an Indiana statute which in effect prohibited the interstate transportation of animal carcasses not slaughtered for food. The Court, relying on *Sligh,* recognized that the statute was "a sanitary and health measure *not intended to cause discrimination against or to burden interstate commerce . . .*" 306 U.S. at 443 (emphasis added). The Court clearly stated:

> "Here, contrary to what seems to be the insistence of counsel, *the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.*
>
> "We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.
>
> "There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the State from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end." *Id.* at 443-4 (Emphasis added).

See also *Price* v. *Illinois,* 238 U.S. 446 (1915); *Asbell* v. *Kansas,* 209 U.S. 251 (1908).

The Commerce Clause thus does not impair state authority to deal with threats to public health, safety and welfare. Rather, the intent of the Commerce Clause was to prevent economic balkanization of the states, such as by the enactment of legislation designed to further the economic interests of a state's own residents at the expense of others. This point was cogently stated by Justice Jackson in *Hood* v. *DuMond,* 336 U.S. 525, 533 (1949):

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack

of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

Measured by these principles, it is clear that chapter 363 does not offend the Commerce Clause because it is properly designed to protect the public health, safety and welfare of the residents of this State rather than to serve any local economic advantage. It is clear, as indicated in the opinion of the Supreme Court of New Jersey, that there is an acute shortage of available landfill space within New Jersey. This means that New Jersey faces the threat of not being able to dispose of the wastes generated within its own boundaries unless it can find new areas for disposal. It is also clear that the disposal of waste does present a serious threat to public health, safety and welfare. It pollutes water by the runoff of leachate, it generates gases which not only can be dangerous to breathe but also create fire hazards, and it severely limits the potential future use of property on which landfills are located. Finally, it is clear that New Jersey's solid waste problems, serious in any event, have been significantly aggravated by the disposal at New Jersey landfill sites of waste from outside the state. As the Supreme Court of New Jersey found, approximately 8% of all waste disposed of in New Jersey originates out of state and in some areas the percentage of out of state waste is as high as 50% (App. 35, Pa35). Thus, chapter 363 serves a clear public health, safety and welfare interest by reducing the overall quantity of waste which the State must dispose or incinerate, and it is as fully compatible with the Commerce Clause as was the exclusion in *Clason* v. *Indiana* of animal carcasses not intended for consumption as food.

It is also clear that there is no element of economic discrimination in the exclusion from New Jersey of waste originating out of state. No New Jersey commercial interests stand to gain an advantage from this ban over competitors from outside the state. On the contrary, among the appellants are New Jersey landfill operators. The complaint is not that New Jersey has forged an economic preference for its own commercial interests but rather that, in order to protect the health, safety and welfare of the citizenry at large, it has denied a small group of its entrepreneurs an economic opportunity to traffic in waste.

The appellants, in seeking to avoid the line of cases holding that the Commerce Clause does not prevent the states from enacting legislation to protect the health, safety and welfare of their citizens, rely on cases which have no bearing upon the restrictions which the Commerce Clause places on the states, in the absence of congressional action, but deal instead with the breadth of the power which the clause confers upon Congress. See *e.g. United States* v. *Pennsylvania Refuse Removal Association,* 242 F. Supp. 794 (E.D. Pa. 1965) *aff'd* 357 F. 2d 806 (3rd Cir. 1966) cert. den. 384 U.S. 961 (1966); *United States* v. *Bishop Processing Company,* 287 F. Supp. 624 (D. Md. 1968). *Bishop Processing* recognized that the movement of air pollutants across state lines provided an adequate jurisdictional basis under the Commerce Clause for the enactment of the Clean Air Act. 42 U.S.C.A. § 1857, *et seq.* However, this does not mean that the Commerce Clause would present an obstacle to the enactment of legislation by New Jersey to prevent all of Pennsylvania's air pollution from being collected and shipped to New Jersey for release on the property of a well-paid entre-

preneur.* Similarly, although the Court has held federal statutes prohibiting the interstate transportation of prostitutes, *Hoke* v. *United States,* 227 U.S. 308 (1913), adulterated eggs, *Hipolite Egg Co.* v. *United States,* 220 U.S. 45 (1911) and kidnapped persons, *Gooch* v. *United States,* 297 U.S. 124 (1936) to be appropriate exercises of congressional power under the Commerce Clause, this does not mean that it would stand in the way of state legislation directed against these evils. The cases dealing with the reach of congressional power under the Commerce Clause are thus inappropriately relied upon by the appellants.

The appellants also rely on the "natural resource" cases to support their attack upon chapter 363. *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *West* v. *Kansas Nat. Gas Co.,* 221 U.S. 229 (1911). However, these cases all dealt with statutes which attempted, as described in *Pennsylvania* v. *West Virginia,* "to regulate the interstate business to the advantage of the local customers." 262 U.S. at 597-598. Therefore, these cases involved, under the analysis contained in *DuMond* v. *Hood, supra,* state regulation ". . . to constrict the flow of . . . commerce for their economic advantage . . .", not an attempt by the State ". . . to shelter its people from menaces to their health or safety. . . ." 336 U.S. at 533. The restrictions were therefore naturally found to offend the Commerce Clause.

In short, Commerce Clause cases are concerned with the loss of products or resources to the chain of commerce.

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* Similarly, if the ships in *Huron Portland Cement* v. *City of Detroit,* 362 U.S. 440 (1960), cited by appellants, were collecting all of the smoke which was produced while steaming the Great Lakes and were releasing it in Detroit Harbor, an ordinance prohibiting such a release would not be struck down by the Court.

This is true whether the product or resource is avocados, *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132 (1963), butter, *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942), milk, *Hood & Sons, Inc.* v. *DuMond, supra,* raisins, *Parker* v. *Brown,* 317 U.S. 341 (1942), or natural gas, *Pennsylvania* v. *West Virginia, supra; West* v. *Kansas Natural Gas Co., supra.* In the present case, on the other hand, chapter 363 was not designed nor does it have the effect of furthering New Jersey commercial interests. Rather, its objective was to protect the citizens of the State from the direct threats to the public health and the environment noted by the Supreme Court of New Jersey.

In arguing that this case is not controlled by the decisions of the Court holding that the Commerce Clause is not violated by state legislation directed towards the protection of the State's health, safety and welfare, the appellants now urge, notwithstanding the record which was before the Supreme Court of New Jersey, that the disposal of waste really involves no threat to the health or welfare of New Jersey's residents. In so doing, they portray a seriously misleading picture of the record before the Supreme Court of New Jersey and the procedural history of this matter in the state courts. Significantly, appellants' belated attack on the environmental and health problems involved in solid waste disposal rests heavily on two affidavits, inserted in the appendix to their jurisdictional statement, which undoubtedly were never seen by any justice of the Supreme Court of New Jersey prior to its decision. One of the affidavits, contained in Appendix Z, is dated November 25, 1975, *a week after the decision of the Supreme Court of New Jersey from which the appellants have appealed.* The second, contained in Appendix G, was submitted to the trial court in support of an application for temporary restraints, but it was not included

in an appendix or in any other way brought to the attention of the Supreme Court of New Jersey. Therefore, appellants presented no substantial material to the Supreme Court of New Jersey to cast any doubt on the prevailing view that landfills do present serious health and environmental problems. In fact, the only material on this subject submitted to the trial court on the cross motions for summary judgment and included in the appendices to the briefs submitted to the Supreme Court of New Jersey was a lengthy document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management". This report stated *inter alia*:

> "Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating." (Pa37).

After discussing in greater detail the environmental and health problems in solid waste disposal, the document concludes with a two-page bibliography of pertinent literature dealing with solid waste problems (Pa47 to Pa48). There was therefore an abundance of material before the Supreme Court of New Jersey dealing with the environmental and health problems posed by waste disposal, on which it appropriately relied in its opinion.

Appellants' final argument, apparently fashioned in recognition of the fact that the record simply does not support their claim that this case falls outside the *Clason* v. *Indiana* line of cases, is that the Supreme Court of New Jersey somehow thwarted their efforts to develop a full record and thereby denied the appellants due process of law. This contention is frivolous. It was appellants' trial strategy which determined the course of proceedings in the state courts. Soon after the filing of their complaint, the appellants moved for summary judgment ". . . only upon the issues of federal pre-emption and discrimination against interstate commerce . . ." (App. 205). Thus the essential thesis upon which the matter was submitted to the trial court was that, regardless of the impact on environmental degradation, if New Jersey permitted the dumping in landfills of waste originating within the state, it was also obligated by the Commerce Clause to accept out-of-state garbage for dumping in its landfills. On the appeal by the State to the Supreme Court of New Jersey, appellants again essentially relied upon the thesis that chapter 363 violated the Commerce Clause by "discriminating" against waste originating out of state. No serious question was raised as to the validity of legislative findings that environmental degradation was being aggravated by the dumping in New Jersey of wastes originating out of state. However, the Supreme Court of New Jersey rejected the appellants' thesis, finding that ". . . the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions . . ." (App. 50-51), and, as had been urged by the State,* rejected ap-

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* The brief filed with the Supreme Court of New Jersey concluded by stating that ". . . the decision below should be reversed and the matter should be remanded with instructions to grant defendants' motion for summary judgment on the Commerce Clause issue."

pellants' claim that chapter 363 was inconsistent with the Commerce Clause. It was then for the first time on a motion for remand to the trial court that appellants raised questions concerning the findings of the New Jersey Legislature and the Supreme Court of New Jersey as to the deleterious impact on the environment of the dumping of out-of-state wastes in New Jersey (App. 219-221). The Supreme Court of New Jersey, over the strenuous objections of the State, granted this motion for remand to the trial court ". . . for such further proceedings, if any, that that court may deem appropriate . . ." (App. 224). Therefore, assuming that any facts remained to be heard, which the State denied, the appellants were given an opportunity to develop those facts. However, the appellants deliberately elected not to proceed before the trial court and instead to enter into a consent dismissal with prejudice. It is therefore surprising, to say the least, to find appellants now claiming that this disposition by the state courts denied them due process of law. Appellants' explanation for this strange procedural posture is to say that they needed an injunction against the effectiveness of chapter 363 and, since the Supreme Court of New Jersey had foreclosed the grant of that relief in the state system, it was not in their strategic best interests to continue with state court proceedings. However, appellants' strategic situation did not differ from that of any other party who has been denied preliminary injunctive relief by a state court, since the right of appeal from the state courts to the Supreme Court of the United States is limited to final judgments under 28 U.S.C. § 1257(2). Therefore, if there were any substance to appellants' argument, 28 U.S.C. 1257(2), to the extent it permits appeals to the Supreme Court of the United States only from final judgments, would be subject to attack on due process grounds. The appellants' due process argument is therefore plainly frivolous.

Finally, it should be noted that if any appellant landfill operator really were in a position to establish that it could conduct a disposal operation for waste originating out of state without threat to the health, safety and welfare of New Jersey citizens, it could obtain a further exemption from the prohibitory impact of chapter 363. The statute confers broad power upon the Commissioner of Environmental Protection to permit waste originating out of state to be brought into the State where he determines that this can be done ". . . without endangering the public health, safety and welfare . . ." (App. 62). If any party were able to show that any exemptions from the prohibition against dumping waste originating out of state could be adopted ". . . without endangering the public health, safety and welfare . . .", it must be presumed that the Commissioner would extend the scope of the existing exemptions. Moreover, under the broad principles of judicial reviewability of administrative actions which exist in New Jersey (see *in re Senior Appeals Examiners,* 60 N. J. 356, 290 A. 2d 129 (1972)) if the Commissioner in exercising his power under the law were "arbitrary, unreasonable and capricious," his actions could be set aside on appeal to the courts. However, in the procedural posture in which appellants have placed this matter before the court, it must be assumed, as has been found by the New Jersey Legislature and the Supreme Court of New Jersey, ". . . that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1l-9. Accordingly, the court properly found chapter 363 to be consistent with the Commerce Clause.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1975.

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No. .

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC. AND DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL.

ARGUMENT.

Appellees' Motion to Dismiss the Appeal on the Ground That Same Does Not Present a Substantial Federal Question Should Be Denied.

In the "Counter-Statement of the Case" contained in Appellees' Brief in support of their motion to dismiss the appeal in the within matter, a lengthy excerpt from a statement entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" is set forth verbatim. Appellees' apparent intention in quoting the excerpted passage is to present a factual nexus to legitimatize the adoption of *P. L.* 1973, *c.* 363 in the State of New Jersey. While the quoted material undoubtedly represented the official position of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management, at the time of its publication it can hardly be characterized as either factually undisputed or materially complete.

On November 8, 1973, the Commissioner of the New Jersey Department of Environmental Protection gave legal notice of the publication of proposed Rules of the Bureau of Solid Waste Management (Appendix N, A. 114). Appended to each copy of said proposed Rules was a statement entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management". Appellees filed a copy of said statement with the trial court as an attachment to an affidavit dated January 30, 1974, which affidavit was submitted by the Chief of the Bureau of Solid Waste Management for the purpose of opposing Appellants' application for an interlocutory injunctive order. The specific averment in said affidavit with respect to the

"Basis and Background" was on information and belief,[1] and did not conform with the requirements of *R.* 1:6-6 of the Rules of Court of the State of New Jersey:

> If a motion is based on facts not appearing of record, or not judicially noticeable the court may hear it on affidavits *made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify* and which may have annexed thereto certified copies of all papers or parts thereof referred to therein. The court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions. (Emphasis added.)

Accordingly, the "Counter-Statement" presented by Appellees is not a competent statement of the case. Its evidential value should be considered by this Court only to the extent that it represents an admission against interest by a party to a civil action, *N. J. Rules of Evidence, Rule* 63(7).

A substantial portion of the quoted material deals with the *cost* of solid waste collection and disposal, and not as one might expect, with the potential for harm to public health and environmental quality. This is not surprising. According to a statement in the "Basis and Background" report not quoted by Appellees, collection and haulage of solid waste in New Jersey ". . . accounts for 75 to 85 percent of the total collection/disposal costs. . . ." Depletion of nearby disposal sites inevitably leads to increased cost.

1. Paragraph 9 of said affidavit reads as follows:
"The facts set forth in the Basis and Background document promulgated with the Department's proposed revision of solid waste management regulations are, upon information and belief, true."

In this context, Appellees are somewhat presumptuous when they present the question:

> "Does the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution require a state acting to fulfill its obligation to provide solid waste disposal facilities for its own residents also to provide such facilities for other states?"

The State of New Jersey provides no such facilities. Disposal sites, with few exceptions not material here, are owned and operated exclusively by private industry, and regulated by the State in the public interest, *N. J. S. A.* 13:1I-1 *et seq.; N. J. S. A.* 48:13A-1, *et seq.; N. J. A. C.* 7:26-1 *et seq.*

It has recently become fashionable in New Jersey to assert, without hesitancy or reservation, that a solid waste disposal crisis exists in the State, *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,* 64 *N. J.* 190, 193 (1974); *Hackensack Meadowlands v. Mun. Landfill Auth.,* 64 *N. J.* 451, 460 (1975). However, there is a vast difference between rhetoric and fact. Appellees suggest a purported ". . . acute shortage of available landfill space within New Jersey" (Brief, p. 12) as being a clearly established fact. Yet, the principal environmental engineer of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management testified, under oath, that no effort has been made by the Department to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey (Appendix O, A. 200); and an averment contained in an affidavit executed by two licensed professional engineers (Exhibit A, *infra*) stating that:

> "There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill pur-

> poses which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection."

has never been challenged by Appellees and is undisputed in the record.

Finally, there has been no showing whatsoever that the regulated importation of solid and liquid waste presents an inherent threat or serious potential for harm to public health or environmental quality. Indeed, quite the contrary has been established. The principal environmental engineer of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management acknowledged under oath that the Rules of the Bureau, *N. J. A. C.* 7:26-1 *et seq.*, were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment (Appendix O, A. 198). Although this admission has been repeated time and time again in briefs and arguments before the trial court and the New Jersey Supreme Court, its accuracy has *never* been challenged by Appellees, who had countless opportunities either to clarify or to refute the statement.

CONCLUSION.

It is respectfully urged that Appellees' motion to dismiss the appeal for lack of a substantial federal question be denied.

Respectfully submitted,

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EXHIBIT A.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
Docket No. L-15068-73 P.W.
Civil Action

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CITY OF PHILADELPHIA, ETC, ET AL.
Plaintiffs

v.

STATE OF NEW JERSEY, ET AL.
Defendants

STATE OF NEW JERSEY }
COUNTY OF MERCER } ss.:

RICHARD A. PELUSO and DENNIS G. FENN, being duly sworn upon their oaths, according to law, depose and say:

1. I, Richard A. Peluso, am a professional engineer licensed to practice in the State of New Jersey.

I, Dennis G. Fenn, am a civil engineer practicing in the State of New Jersey.

2. I, Richard A. Peluso, hold a master's degree in Environmental Engineering and have completed almost all course work toward a doctor's degree in said field, and have had in excess of five years experience in the field of solid waste management.

I, Dennis G. Fenn, hold a master's degree in Environmental Engineering and have over three years experience in the field of solid waste management.

3. In the event plaintiffs are required to remove solid waste previously disposed of in a sanitary landfill facility it would be necessary to open a face in the landfill, which would seriously increase the potential danger to both the health of the residents of the State of New Jersey and the quality of the environment of said State.

4. The principal hazards precipitated by such removal includes a proliferation of leachete, vermin and rats, and the creation of serious odor problems.

5. There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill purposes which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection.

6. A typical sanitary landfill site consisting of 200 acres, and operated in compliance with the regulations of the New Jersey Department of Environmental Protection would remain fully operational to dispose of 10,000 tons of solid waste per week for a period of approximately 15 years.

RICHARD A. PELUSO
Richard A. Peluso
DENNIS G. FENN
Dennis G. Fenn

Sworn to and Subscribed before me this 31st day of January, 1974.

FLORENCE MASSEY
Florence Massey
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 16, 1977

CERTIFICATE OF SERVICE.

I hereby certify that on this 26th day of March, 1976, three copies of this Brief in Opposition to Appellees' Motion to Dismiss the Appeal were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey 08625; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080; to David N. Samson, Esquire, attorney for defendants-respondents in the companion case Hackensack Meadowlands v. Mun. Landfill Auth., A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052; and to William C. Brashares, Esquire and Paul M. Laurenza, Esquire, Cladouhos & Brashares, attorneys for movants for permission to file a brief as Amicus Curiae, National Solid Wastes Management Association, at their law offices located at 1750 New York Avenue, N.W., Washington, D. C. 20006.

I further certify that all parties required to be served have been served.

by: Arthur Meisel
Arthur Meisel

Supreme Court, U. S.
FILED
JUN 3 1976

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF OF APPELLANTS.

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IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1975.

—

No. 75-1150.

—

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC, AND DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

BRIEF OF APPELLANTS.

—

OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:1I-9, 10) unconstitutional is not reported. The opinion of the Superior Court of New Jersey, Chancery Division, in the

companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711. The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975) in the within Brief.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside the judgment of the New Jersey Supreme Court which upheld the constitutionality of *P. L.* 1973, *c.* 363. Said judgment was rendered on November 18, 1975, and entered on the same date. Thereafter, on December 11, 1975, the New Jersey Supreme Court remanded the matter to the Superior Court, Law Division, "for such further proceedings, if any, that that Court may deem appropriate . . ." (A340). On December 19, 1975, the New Jersey Superior Court, Law Division, issued its order stating, in pertinent part, that ". . . no further proceedings are deemed appropriate by this Court . . ." (A343). A notice of appeal to the Supreme Court of the United States was thereafter filed in the New Jersey Supreme Court on January 9, 1976. The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3).

STATUTE INVOLVED.

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the 'Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is solid and liquid waste, or the process of collecting, transporting, treating and disposing of same, a recognized subject of interstate commerce?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place an undue burden upon interstate commerce?

3. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard, prior to the final determination, on the material issues of fact raised by their complaint?

STATEMENT OF THE CASE.

On January 2, 1974, *P. L.* 1973, *c.* 363, being

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

was approved by the Governor of the State of New Jersey, to become effective on February 1, 1974.

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (A7). Their simultaneous application for a temporary restraining order was supported by an affidavit of a licensed professional engineer (A37) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

• • •

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> "4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat

> to the health, welfare or safety of the residents of the State of New Jersey." [1]
>
> • • •

It was further supported by a copy of a letter dated December 26, 1973 from Richard W. DeKorte, Esq., Counsel to Governor William T. Cahill, to David Quient, Esq., city attorney of appellant City of Glen Cove (A47), in which the Counsel to the Governor stated:

> "Also, I might add that Senate Bill No. 2367 (OCR) [*P. L.* 1973, *c.* 363] would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

Based upon the aforesaid documents, and additional affidavits which documented that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (A5). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [2] (A105).

1. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been confirmed by appellees. See p. 9 *infra*.

2. *N. J. A. C.* 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."

A verbatim copy of the entire rule as same was adopted by the Commissioner appears at A92.

In granting interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (A55), which averred, in pertinent part, as follows:

> • • •
>
> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no

immediate health threat to justify the precipitous passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [*N. J. A. C.* 7:1-4]

• • •

. . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

• • •

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

• • •

. . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and

state environmental and land use laws, guidelines, regulations, and recognized engineering practices."

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974 (A118).

On February 11, 1974, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co. and Continental Vanguard, Inc. were granted leave to intervene.

Thereafter on February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that the principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State. They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (A97).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (A107, 109), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[3] He also revealed that no effort had been

3. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust, (b) odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and

made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A115).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (A116).[4] Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (A121-122), that summary judgment not be granted to appellants pending a hearing on the merits:

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.*
>
> • • •
>
> "Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

3. (Cont'd.)
ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

4. The motion did not seek summary judgment with respect to the many remaining federal constitutional questions raised by the complaint since those questions involved genuine issues of material fact (A7 *et seq.*, 120).

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (A206) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminated against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (A216), by which they appealed from the trial court's grant of summary judgment to appellants.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (A218). Said motion was denied by the Court on August 14, 1974 (A220).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[5] by order dated October 7, 1974 (A223). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (A225).

By its ruling, the New Jersey Supreme Court adopted a novel and unprecedented procedural approach: it disposed, on its merits, of a case involving substantial disputed issues of material fact which had never been heard

5. In *Hackensack Meadowlands,* suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

by the trial court.[6] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants emergent motion for a stay of judgment and interim injunctive relief pending its further order (A257).

In an effort to abate the extreme prejudice visited upon them, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (A259). The trial court reported that it could hold a plenary hearing within two weeks. In the alternative, appellants sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the

6. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception (A70), were not part of the appendix presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the Rules of Court, appellants understood that the case would be remanded for a hearing on the merits if an appellate court reversed the order of the trial court granting summary judgment.

emergency stay that it had previously issued, effective December 31, 1975, and further

> "ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> ORDERED that this Court does not retain jurisdiction."
>
> (A340).

Based upon this order, appellants and intervenors were compelled, as a practical matter, to dismiss with prejudice every count in their respective complaints which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (A342), the trial court

> "FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975. Thereafter, probable jurisdiction was noted on April 5, 1976.

SUMMARY OF ARGUMENT.

Solid and liquid waste, and the service of collecting, transporting, treating and disposing of same, are recognized subjects of interstate commerce.

A statute which prohibits the entry of a subject of commerce, irrespective of condition or potential for harm, is directed against commerce and may not stand.

If a threat is caused to the public health and environmental quality by solid and liquid waste, or the process of treating, transporting and disposing of same, it is based upon the nature of the substance being regulated and not its place of origin. Regulation of such commerce must be accomplished in an evenhanded, nondiscriminatory manner.

The Court will decide for itself whether a statute represents a legitimate exercise of the state's police power, or whether it really amounts to a discriminatory regulation of interstate commerce and a direct burden thereon.

A police regulation which affects interstate commerce must not go beyond the necessities of the particular case. If the legislative purpose is to preserve acreage from use as a disposal site, there is no reason to prohibit entry or forms of treatment and disposal other than sanitary landfilling.

In light of the many genuine issues of material fact, the New Jersey Supreme Court erred in upholding the constitutionality of *P. L.* 1973 *c.* 363 as not violative of the Commerce Clause absent a hearing, on the merits, before the trial court. Appellants were thereby denied due process of the law.

ARGUMENT.

A.

Solid and Liquid Waste, and the Process of Collecting, Transporting, Treating and Disposing of Same, is a Recognized Subject of Interstate Commerce.

In the proceedings before the New Jersey Courts, Appellees argued that solid and liquid waste are not legitimate subjects of interstate commerce, and therefore not within the purview of the commerce clause. This contention was rejected below, and is wholly unsupportable in law and in fact.

The meaning of the clause "legitimate subject of commerce" was explained by Mr. Justice Matthews in *Bowman v. Chicago &c Railway Co.*, 125 *U. S.* 465 (1888). Holding that a state cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate interstate commerce, the court stated:

> "*. . . It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.*
>
> • • •
>
> . . . Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their

condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life.

Bowman v. Chicago &c Railway Co., 125 *U. S. supra*, at 488-489. (Emphasis added.)

Pursuant to the decision in *Bowman*, if solid or liquid waste or some identifiable portion thereof is a "known article of commerce", or if the service of collecting and disposing of solid or liquid waste is a "subject of trade or commerce", then a prohibition against importation cannot be imposed merely on account of intrinsic nature, without regard to condition and quality.

Subjects of interstate commerce are determined by ". . . practical consideration and the established course of business". *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S.* 110 (1928), *Shafer v. Farmers Grain Co.*, 268 *U. S.* 189, 198 (1925), *Public Utilities Comm. v. Landon*, 249 *U. S.* 236, 245 (1919); cf. *Rearick v. Pennsylvania*, 203 *U. S.* 507, 523 (1906). Commerce is not confined to transportation alone, but comprehends all commercial intercourse, including the component parts thereof.[7]

7. Commerce, in the Constitutional sense, contemplates every kind of intercourse, including the transmission of electric current, *FPC v. Florida Power & Light Co.*, 404 *U. S.* 453, 458 (1972), and radio waves, *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 *U. S.* 266, 279 (1933), pastured cattle meandering across a state line, *Thornton v. United States*, 271 *U. S.* 414 (1926), the interstate movement of petroleum, *Pipe Line Cases*, 234 *U. S.* 548, 560 (1914), telegraphic communications by wire, *Telegraph Co. v. Texas*, 105 *U. S.* 460, 464 (1882) and pollutants in ambient air, *United States v. Bishop Processing Co.*, 287 F. Supp. 624, 629 (D. Md. 1968). With respect to pollutants in ambient air and water, see also *Illinois v. Milwaukee*, 406 *U. S.* 91, 103 (1972).

Dahnke-Walker Co. v. Bondurant, 257 *U. S.* 282, 290 (1921).

Appellants' solid waste collection and disposal companies are lawful business entities existing under the laws of the State of New Jersey (A7), *N. J. S. A.* 14A:1-1 *et seq.*, and generally empowered by same

> "to conduct its business, carry on its operations, and have offices and exercise the powers granted by this act anywhere in the universe".
>
> *N. J. S. A.* 14A:3-1(1)(i)

Appellees admit that solid waste collected outside New Jersey has been disposed of at sanitary facilities within the State [8] (A83, 97), and that certain communities in New Jersey dispose of all or a portion of their solid waste outside the State of New Jersey (A114). Such practice has been carried on for years. *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 *F. Supp.* 794 (E. D. Pa. 1965).

The legislature has recently acknowledged the solid waste industry as an integral part of "the free enterprise system" in New Jersey. *P. L.* 1975, *c.* 326, *N. J. S. A.* 13:1E-2b(5). It has also specifically recognized the need to assure an adequate volume of solid waste at solid waste facilities: [9]

> "The Legislature recognizes that solid waste and recycling facilities will be financed through long term borrowing which requires the negotiation of long term contracts with municipalities

8. According to Departmental estimates, 1.5 million tons of solid waste originating outside of the State was disposed of in New Jersey in 1971 (A83-84).

9. The term "solid waste facilities" is defined in the Act to ". . . mean and include . . . incinerators . . . [and] sanitary landfill facilities or other plants for the disposal of solid waste . . . in a sanitary manner". *P. L.* 1925, *c.* 326, *N. J. S. A.* 13:1E-3h.

and other solid waste collectors *to guarantee the flow of solid waste to such facilities.*"

P. L. 1975, *c.* 326, *N. J. S. A.* 13:1E-2c. (Emphasis added.)

Appellant City of Philadelphia has entered into long term contracts with sanitary landfill facilities located in New Jersey (A31, 41, 271). Expenditures for environmental controls approximating $500,000 were made at Appellant Kinsley's Landfill, Inc. sanitary landfill site upon the direction of the Department of Environmental Protection (A270). The improvements would not have been made but for a ten year contract with Philadelphia (A271). A sanitary landfill must receive a sufficient quantity of solid waste to be economically feasible (A271, 281-282). If prevented from obtaining solid waste, the business of Kinsley's and of other Appellant sanitary landfill owners will be greatly diminished or destroyed (A44, 254, 271, 281). *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S. supra*, at 8.

The proposition that the disposal in one state of solid waste collected in another state constitutes an activity in interstate commerce is too well established to be seriously questioned. In *United States v. Pennsylvania Refuse Removal Assn.*, 242 *F. Supp.* 794 (E. D. Pa. 1965) certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal". 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' arguments that a

worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words 'trade or commerce' as used in the Act*, United States v. Nat'l Assn. of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n.*, 242 *F. Supp., supra*, at 700. (Emphasis added.)

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce". *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F.* 2d 806, 808 (3rd Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).[10]

Established business practice leads inescapably to the conclusion that the collection and disposal of solid waste is a long-accepted activity in interstate commerce. But that is not all. The New Jersey Legislature has implicitly

10. Congress exercised its full power over interstate commerce in the Sherman Act, *U. S. v. Frankfort Distilleries*, 324 *U. S.* 293, 298 (1945), *U. S. v. Underwriters Ass'n.*, 322 *U. S.* 533, 558 (1944), *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 *F.* 2d 732, 739 (9th Cir. 1954). Therefore, if solid waste collection and disposal services in the flow of interstate commerce are viewed as trade or commerce for purposes of the Sherman Act, they also must constitute commerce within the meaning of the commerce clause, *U. S. Const.* Art. 1, Sec. 8, cl. 3.

recognized solid waste collection and disposal as a legitimate subject of commerce. In adopting the Solid Waste Utility Control Act of 1970, *N. J. S. A.* 48:13A-1 *et seq.*, the Legislature found that the *service* of solid waste collection and disposal ". . . is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest, . . ." *N. J. S. A.* 48:13A-2, and that the ". . . rates and public utility aspects of the solid waste collection industry and the solid waste disposal industry . . ." should be regulated by the Board of Public Utility Commissioners, *N. J. S. A.* 48:13A-4. The entire solid waste industry was afforded public utility status by *N. J. S. A.* 48:2-13, which states, in pertinent part:

> "The term 'public utility' shall include every . . . solid waste collection, [or] solid waste disposal . . . system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State . . . ."

In *Wolff Co. v. Industrial Court.*, 262 *U. S.* 522, 535 (1923), Mr. Chief Justice Taft observed that a public utility has ". . . the affirmative duty of rendering a public service demanded by any member of the public". Termination or discontinuance of such service can be effected only with the express approval of the Public Utilities Commission, *N. J. S. A.* 48:2-24. One is hard-pressed to conceive how a legislatively-regulated industry engaged in the performance of an "activity thoroughly affected with the public interest, . . ." *N. J. S. A.* 48:13A-2, could be anything other than a legitimate, indeed a vital, subject of both intrastate and interstate commerce.

While it is thus clear that the valuable service of collecting and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is

often a merchantable commodity.[11] In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160, 170 (Ch. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, the trial court rejected appellee's argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity". The New Jersey Supreme Court agreed, saying:

> "We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for recycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce is involved, as these regulations do clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 467-468.

Sanitary landfilling is itself a method of recycling and resource recovery. Solid waste can be accepted for disposal at a sanitary landfill facility and used in a cost efficient and environmentally sound manner to recover severely mined or devastated lands and to produce gas for com-

11. A United States District Court has recently held that the movement of automobile hulks across state lines constitutes interstate commerce. *Alexandria Scrap Corporation v. Hughes*, 391 *F. Supp.* 46, 59 (Md. 1975); prob. jur. noted, 96 *S. Ct.* 31 (1975), Auto bodies are specifically included within the definition "bulky waste" in the Rules of the Bureau of Solid Waste Management. *N. J. A. C.* 7:26-1.4.3. (A147).

mercial purposes (A275-279). It can also be utilized to create power generation by incineration.

Land recovered through sanitary landfilling is frequently devoted to public recreational use and green acres (A277). It may also be used for residential, commercial and industrial development. Problems previously encountered at former sanitary landfill sites with respect to support of heavy structures can be avoided by merely leaving certain land areas untouched in the landfilling process (A276). The key, in every situation, is responsible professional planning before sanitary landfill operations commence. Since New Jersey sanitary landfills must be developed in accordance with plans and designs prepared by licensed professional engineers, *N. J. A. C.* 7:26-2.2.3; 7:26-2-4, the purpose to which the site will be devoted upon completion of the sanitary landfill process may be known before any operations begin, *N. J. A. C.* 7:26-2.12.2.22.

Significantly, the *New Jersey State Solid Waste Management Plan*, approved by the United States Environmental Protection Agency as the official State plan for New Jersey, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra*, at 463, frankly states:

> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area." [12]

On occasion, the free flow of commerce has been the subject of state regulatory action. In the absence of controlling federal legislation or implied federal preemption, a state may exercise its police power to prevent deception or fraud upon the public, *Plumley v. Massachusetts*, 155 *U. S.* 461 (1894), *Hebe Co. v. Shaw*, 248 *U. S.* 297 (1919), *Hygrade Provision Co. v. Sherman*, 266

12. *New Jersey Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) at p. 71.

U. S. 497 (1925), the prompt disposal of large animals not slaughtered for food, *Clason v. Indiana*, 306 *U. S.* 439 (1939), and the importation of unhealthy swine or cattle, *Asbell v. Kansas*, 209 *U. S.* 251 (1908); *Mintz v. Baldwin*, 289 *U. S.* 346 (1933), decayed, noxious or adulterated foods, *Crossman v. Lurman*, 192 *U. S.* 189 (1904); *Savage v. Jones*, 225 *U. S.* 501 (1912), *Price v. Illinois*, 238 *U. S.* 446 (1915), or immature citrus fruits unfit for human consumption, *Sligh v. Kirkwood*, 237 *U. S.* 52 (1915). However, a state may not, even in these situations, exclude articles of commerce with impunity.[13]

A regulation designed to protect the public health must be reasonable in its requirements, promote its objective without discrimination, and not go beyond the necessities of the particular case: [14]

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance

13. In *Schollenberger v. Pennsylvania*, 131 *U. S.* 1 (1898), this Court held that a statute prohibiting the sale in Pennsylvania of any oleaginous substance, other than that produced from unadulterated milk or cream, violated the Commerce Clause:

> . . . absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure
>
> • • •
>
> . . . it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

14. See *Bourjois, Inc. v. Chapman*, 301 *U. S.* 183, 187 (1937); *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951); *Great A. & P. Tea Co v. Cottrell*, — *U. S.* —, 47 *L. Ed.* 2d 55 (1976).

> to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food."
>
> *Savage v. Jones*, 225 U. S., *supra*, at 525.

An identical sentiment was expressed in *Plumley v. Massachusetts*, 155 U. S. 461, 471 (1894), where this Court, in upholding a statute prohibiting the manufacture or sale of oleomargarine colored in imitation of yellow butter, said: "If the Statute of Massachusetts had been so framed as to be applicable only to oleomargarine manufactured in other states, . . . the case would have been wholly different".

Although countless opportunities were presented, Appellees never contended by any affidavit that (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state; or (c) the inherent condition of solid waste is such that it will always spread pestilence and disease. Quite to the contrary, interstate disposal of solid waste has been carried on, without interruption, for many years. During that period, state regulations have applied equally to all solid waste regardless of the place of its collection.

The interstate transportation of solid and liquid waste for treatment and disposal represents a legitimate, indeed a necessary and vital, activity in interstate commerce.

B.

P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled:

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

reveals that its sole intent and purpose is to impose an immediate, absolute, and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and disposal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not, by that fact alone, immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. As reiterated by Mr. Justice Rutledge in *Nippert v. Richmond*, 327 U. S. 416, 425 (1947), ". . . not all burdens upon commerce, but only undue or discriminatory ones, are forbidden"; and in *Cities Service Co. v. Peerless Co.*, 340 U. S. 179, 186-187 (1950), Mr. Justice Clark observed:

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state

interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."

Absent controlling federal legislation, the commerce clause does not deprive the states of the power to regulate matters of local public concern in those areas where uniformity of regulation is not necessary, as long as the exercise of the police power serves a real and legitimate purpose and does not place an undue or excessive burden on or discriminate against interstate commerce.

The test has been stated most recently by this Court in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970);

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows:
>
> *Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld* unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 372 U. S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally, the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U. S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See e.g. *Schafer v. Farmers Grain Co., supra.*" (Emphasis added)

See also *Great A. & P. Tea Co. v. Cottrell*, — U. S. — , 47 L. Ed. 2d 55 (1976).

Pursuant to the test announced in *Pike*, a balance will *not* be made between the burden imposed on interstate commerce, on the one hand, and the putative local benefits, on the other hand, unless it is first determined that the regulation (a) is evenhanded, (b) is based upon a legitimate local purpose, and (c) only incidentally affects interstate commerce. If it is defective on any of these grounds, then the regulation must fall.

1. Evenhandedness.

A prohibition directed solely against solid or liquid waste which originates or is collected *outside* the State, and against the movement of such waste through New Jersey, is not evenhanded, and constitutes a direct burden and discriminatory regulation of interstate commerce. Discrimination against interstate commerce in any form or method is prohibited by the Commerce Clause. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185 (1938).

In the single paragraph of its opinion devoted to the discrimination issue, the New Jersey Supreme Court commented:

> "Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or

significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state."

Hackensack Meadowlands v. Mun. Landfill Auth., 68 *N. J.*, *supra*, at 475.

In *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance, where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The Court's responsibility in this area has been emphasized by Mr. Justice Reed in *Best & Co. v. Maxwell*, 311 *U. S.* 454, 455-456 (1940) where he commented:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

This responsibility has been undertaken conscientiously and with great care by the Court. In *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877), the United States Supreme Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year.

Speaking for a unanimous Court, Mr. Justice Strong announced the general rule governing sanitary and health laws as follows:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.

Railroad Co. v. Husen, 95 *U. S.*, *supra*, at 472.

Applying this rule to the statute of Missouri, Mr. Justice Strong found a clear attempt to regulate interstate commerce:

"It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they

> are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 473.

In *Plumley v. Massachusetts*, 155 *U. S., supra*, at 469, Mr. Justice Harlan had occasion to discuss the holding in the *Railroad Co.* case. He noted that the object and effect of said statute ". . . was to meet at the borders of Missouri a *large and common subject of commerce* and prohibit its crossing the state line during the larger part of each year. . . ." (Emphasis added.)

A statute enacted to prevent the sale of unwholesome meat was considered and struck down in *Brimmer v. Rebman*, 138 *U. S.* 78 (1891). The statute declared it to be unlawful to offer for sale within Virginia any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale unless previously inspected and approved by local inspectors. Inspection was not required of fresh meats from animals slaughtered within one hundred miles from place of sale.

Rejecting the state's contention that the statute represented a valid police regulation reasonably designed to protect the public health, Mr. Justice Harlan stated:

> "Whether there shall be inspection or no, . . . is made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered. . . . [A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
>
> *Brimmer v. Rebman*, 138 *U. S., supra*, at 82.

See also *Minnesota v. Barber*, 136 *U. S.* 313 (1890) and *Scott v. Donald*, 165 *U. S.* 58 (1897).

In *Rasmussen v. Idaho*, 181 *U. S.* 198 (1901), this Court upheld an Idaho statute which empowered the Governor of Idaho to regulate or prohibit the importation into the state of sheep from localities outside the state where scab or other infectious disease has become epidemic. Speaking for a unanimous Court, Mr. Justice Brewer distinguished the *Railroad Co.* case upon which the plaintiff in error in *Rasmussen* largely relied:

> "It will be perceived that *the act in Railroad Co. v. Husen was an absolute prohibition* operative during eight months of the year. *It was an act* continuous in its force; provided for no inspection, and was *predicated on the assumption that the State had the right to exclude* for two-thirds of each year *the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.*
>
> In the case before us the statute makes no absolute prohibition of the introduction of sheep,

but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the State sheep inspector, to be necessary."

Rasmussen v. Idaho, 181 *U. S. supra*, at 201. (emphasis added)

A similar quarantine act was considered in *Oreg.-Washington Co. v. Washington*, 270 *U. S.* 87 (1926). The Washington Director of Agriculture, with the approval of the Governor, forbade the importation into the state of alfalfa hay or meal (except in sealed containers) from designated counties outside the state in which, upon inspection, a weevil injurious to the alfalfa plant was found. After reciting the general rule that, absent arbitrariness or discriminatory motive, a state may prevent the introduction within its borders of human beings, animals or plants which may cause disease, injury or destruction to the State's inhabitants and resources, this Court upheld the statute commenting:

"We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous."

Oreg.-Washington Co. v. Washington 270 *U. S., supra*, at 96.

The New Jersey Statute in question imposes an unlimited prohibition without regard to condition. It is an embargo. There is no provision for inspection or for any other deliberative process *prior to* exclusion. The statute is erroneously predicated on the assumption that a state has the right to exclude the introduction of all kinds of solid and liquid waste, whether likely to impair public health and environmental quality or not. *Rasmussen v. Idaho*, 181 *U. S., supra*, at 201.

As in the *Railroad Co.* case, *P. L.* 1973, *c.* 363, is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. *Best & Co. v. Maxwell*, 311 *U. S.* 454 (1940); *Head v. New Mexico Board*, 374 *U. S.* 424, 429 (1963).

In the leading environmental case *Huron Cement Co. v. Detroit*, 362 *U. S.* 440 (1960), an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement Code of the City of Detroit. Finding that the ordinance applied

equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> ". . . state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand.
>
> "It has not been suggested that the local ordinance, applicable alike to 'any person, firm or corporation' within the city, discriminates against interstate commerce as such. *It is a regulation of general application,* designed to better the health and welfare of the community. . . ." *Huron Cement Co. v. Detroit,* 362 *U. S., supra,* at 448 (Citations omitted, emphasis added.)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Even-handed local regulation* to effectuate a legitimate local public interest is valid unless preempted by federal action . . ., or unduly burdensome on maritime activities or interstate commerce. . . ."
>
> *Huron Cement Co. v. Detroit,* 362 *U. S. supra,* at 443 (Citations omitted, emphasis added).

The Court, in *Huron,* stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. Had the ordinance been discriminatory, it surely would have been struck down.

For example, if the City of Detroit had attempted to reduce air pollution and thereby promote the health and welfare of the city's inhabitants by prohibiting the discharge of smoke in the Port of Detroit by any steam-powered vessel shipping out of another port while permitting such discharge by local vessels, then the ordinance would certainly represent an unconstitutional discrimination against interstate commerce.

Similarly, if the State of New Jersey had attempted to reduce air pollution by prohibiting any person from driving a motor vehicle upon the roads of this state unless the vehicle was registered in New Jersey, there would be an unmistakable and intolerable discrimination against interstate commerce.

If there is a threat posed to the health, welfare and safety of the people of New Jersey or to the quality of its environment by the treatment or disposal of solid and liquid waste in accordance with regulations administered by the Department of Environmental Protection (a position which appellants do not believe can be factually supported), *then it is a threat attributable to the nature of the substance being regulated, and not to its place of origin.* Remedial measures based upon the exercise of the State's police power must be undertaken in an even-handed manner. There can be no discrimination in favor of intrastate commerce and against interstate commerce. *Hale v. Bimeo Trading Co.,* 306 *U. S.* 375, 380 (1939).

During the last few years, state and federal courts have been called upon with increasing regularity to review legislation dealing with the maintenance of environmental

values: *American Can Co. v. Oregon Liquor Control Commission*, 15 *Ore. App.* 618, 517 *P.* 2d 691, 703 (Ct. App. Ore. 1973) (ban on non-returnable beverage containers); *Soap and Detergent Association v. City of Chicago*, 357 *F. Supp.* 44 (N. D. Ill. 1973), rev. *Proctor & Gamble Co. v. City of Chicago*, 509 *F.* 2d 69, 78 (7th Cir. 1974), *cert.* den. 421 *U. S.* 978 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Imp. Com'n.*, 307 *A.* 2d 1, 40 (Sup. Jud. Ct. Me. 1973); app. dis., 414 *U. S.* 1035 (1973) (prevention and control of marine oil spillage); *Construction Ind. Ass'n., Sonoma Cty. v. City of Petaluma*, 522 *F.* 2d 897, 909 (9th Cir. 1975) (ban on further building); *Bowie Inn, Inc. v. City of Bowie*, 274 Md. 230, 335 *A.* 2d 679, 688 (Ct. App. Md. 1975) (return deposit requirement).[15]

While the statutes and ordinances in the aforesaid cases were upheld against attacks based upon alleged violations to the Commerce clause, each court was careful to note the absence of discriminatory treatment. Intrastate commerce was treated equally with interstate commerce.

Thus, in *Portland Pipe Line Corp. v. Environmental Imp. Com'n.*, 307 *A.* 2d 1 (Sup. Jud. Ct. Me. 1973), app. dis., 414 *U. S.* 1035 (1973), the Supreme Judicial Court of Maine was called upon to review the constitutionality of an act relative to overwater transfers of petroleum. Plaintiff's challenge of the act was based, in part, upon an alleged impermissible burden on interstate commerce. The Court rejected this argument, saying:

15. See also *Cohen v. Bredehoeft*, 290 *F. Supp.* 1001, 1004 (S. D. Tex. 1968) where, in upholding a municipal ordinance prohibiting fireworks within the city, the court said: "The ordinance treats all fireworks distributors, whether local or foreign, equally and its affect on interstate commerce is incidental to its primary purpose of protecting the public."

"The issue of whether regulations promulgated under the state's police power seeking to protect the state's inhabitants from environmental pollution may be applied to those engaged in interstate commerce was before the Supreme Court in Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960). The City had adopted a smoke abatement ordinance and sought to enforce the penal provisions of that ordinance against shippers admittedly engaged in interstate commerce.

• • •

The Detroit ordinance did not discriminate against interstate commerce and there was no showing that national uniformity was required to prevent inconsistent local regulations.

The Maine Act does not discriminate in favor of intrastate commerce. . . ."

Portland Pipe Line Corp v. Environmental Imp. Com'n., 307 A. 2d, *supra*, at 40. (Emphasis added)

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160 (Ch. 1974) the companion case to the case at bar, Judge (now Justice) Sidney Schreiber[16]

16. Subsequent to his decision in the *Hackensack Meadowlands* case, Judge Schreiber was elevated to the New Jersey Supreme Court. The *Hackensack Meadowlands* case was appealed by the State and consolidated for oral argument with the within-captioned matter. Both cases were disposed of in the same opinion. Understandably, Justice Schreiber did not participate in the proceedings before the New Jersey Supreme Court. However, it is evident from his opinion in *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super. supra*, that a vigorous dissent would have been interposed if he had participated.

struck down regulations adopted by the New Jersey Department of Environmental Protection and the Hackensack Meadowlands Development Commission which prohibited persons engaged in the collection of solid or liquid wastes which originated or were collected outside the State from disposing of same in the Hackensack Meadowlands District. In language equally pertinent to the present matter, Judge Schreiber observed:

> "DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that *it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious.* Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.
>
> Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be accomplished by discrimination based on the source of the refuse."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super., supra,* at 174. (Emphasis added.)

A state cannot discriminate against interstate commerce under the guise of protecting the health of its citizens or its natural resources. The Court has a duty to determine for itself whether the regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce. *Asbell v. Kansas*, 209 *U. S.* 251, 256 (1908). The independent exercise of that duty is especially important because the power to determine the articles which may be the subject of commerce is, in effect, the controlling one. *Bowman v. Chicago & Railway Co.*, 125 *U. S.* 465 (1888).

Legislation designed to prohibit the treatment or disposal in New Jersey of solid waste collected outside the State was first proposed six years ago with the introduction of S. 834 in the New Jersey Senate on May 4, 1970.[17] Section 2 of that bill, entitled "An Act to prevent the treatment and disposal within this State of solid waste collected outside this State", provided as follows:

> "Notwithstanding the provisions of any other law to the contrary, no solid waste collected from any location without the territorial limits of this State shall be treated or disposed of in any solid waste disposal facility located within this State."

By written memorandum dated May 8, 1970,[18] the Commissioner of the New Jersey Department of Environmental Protection advised the Governor that the Department supported ". . . the concept of prohibiting the importation of out-of-state garbage" into New Jersey, and recommended that the bill be signed, if passed by the legislature. The reason for the Department's position was explained by the Commissioner as follows:

> ". . . The amount of land available in landfills is rapidly being depleted. It is in the interests of the State to reserve the available land for

17. Copies of bills introduced in the New Jersey Legislature are available at the New Jersey State Library in Trenton, New Jersey.

18. Said memorandum is contained in the file of the Counsel to the Governor, maintained in the State Archives at the New Jersey State Library, Trenton, New Jersey.

> the disposal of solid wastes originating in the State."

No mention was made of public health or environmental quality.

Although S. 834 passed the Senate, it did not move in the Assembly and died at the end of the legislative session.[19]

A bill almost identical to S. 834, A. 1019, was introduced in the New Jersey Assembly on April 12, 1972 by Assemblyman Dawes. Like its predecessor, A. 1019 expressly prohibited the treatment or disposal in New Jersey of any solid waste collected outside the State.

Less than one month later, on May 4, 1972, a second bill, A. 1132, the Waste Control Act, was introduced by the same Assemblyman. Unlike A. 1019 which contemplated direct statutory prohibition, A. 1132 conferred upon the Commissioner of the Department of Environmental Protection the power to regulate and prohibit the incineration and landfill in New Jersey of solid waste collected outside the State. In his "statement" attached to the bill, Assemblyman Dawes commented:

> ". . . This bill recognizes that the citizens of New Jersey do not have the luxury of unlimited resources and disposal sites. The bill also reflects an awareness that the continuing use of New Jersey lands for solid waste disposal facilities . . . presents an unfortunate picture of the State, particularly in the Hackensack Meadowlands area."

By memorandum dated October 3, 1972,[20] the President of the New Jersey Public Utilities Commission urged

19. Information with respect to bills introduced in the New Jersey Legislature is available in the *New Jersey Legislative Index.*

20. See footnote 18, *supra.*

the Governor to veto A. 1132, if passed, due to the potential for retributive action:

> "If New Jersey prohibits waste collected outside the State from being dumped within the State, it may find that reciprocal action will be taken by neighboring states wherein New Jersey disposes of its solid wastes; e.g., Philadelphia dumps in New Jersey and New Jersey dumps in Pennsylvania."

A. 1019 was never adopted, but A. 1132 passed the legislature and was signed by the Governor on February 21, 1973. The adverse recommendation of the Public Utilities Commission was not accepted. Upon signing the bill, the Governor issued a press release[21] in which he stated that the Waste Control Act represented ". . . a significant step in controlling the daily influx of trash and garbage from adjoining states which threatens to engulf New Jersey's remaining sanitary landfill sites".

Although the Waste Control Act conferred upon the Commissioner of the Department of Environmental Protection the power to prohibit the incineration and landfill in New Jersey of solid waste collected outside the state, *N. J. S. A.* 13:1I-4a, no immediate regulatory action was undertaken by him. Perhaps that was because no immediate threat to the environment or public health was recognized by the Department.

Almost 8 months passed without further activity. Then, on October 19, 1973, Acting Governor Alfred N. Beadleston published a tersely worded press release (A53) saying:

> "I have today directed Commissioner Richard J. Sullivan of the Department of Environ-

21. Press releases issued by the Governors of New Jersey are now collected and maintained at the New Jersey State Library, Trenton, New Jersey.

mental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Governor William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other state. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the

Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible."

Less than a month later, on November 8, 1973, the Commissioner published proposed Rules Governing the Bureau of Solid Waste Management. Section 7:26-1.8 of the proposed Rules contained a provision unconditionally prohibiting the disposal of out-of-state waste within New Jersey.[22]

The rationale for the proposed prohibition is explained in paragraph IV of the "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" (A45-46). Curiously, references to public health and environmental quality are virtually non-existent. If "grave environmental dangers" were being created by the "dumping of garbage in New Jersey from New York", as acting Governor Beadleston had rhetoricized, the Department of Environmental Protection didn't know anything about it. The reasons expressed by the Department for the proposed administrative prohibition were: (1) to as-

22. The text of the proposed rule read as follows:

7:26-1.8 *Out of State Waste*

-1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

-1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

sure the availability of landfill acres in New Jersey for solid waste generated in said State, and (2) to stabilize the cost of solid waste collection and disposal for New Jersey residents.[23]

Four days after the publication of the proposed Rules of the Bureau of Solid Waste Management, on November 12, 1973, S. 2367 was introduced in the New Jersey Senate. The stated purpose of the bill was to prohibit the entry into New Jersey of any solid or liquid waste which originated or was collected outside of the state, except garbage to be fed to swine within New Jersey.[24]

The Department of Environmental Protection was requested to submit its comment on the bill to the Office of the Counsel to the Governor. The comment submitted by the Department,[25] was surprisingly candid:

> "A. *Description of Bill's Effect—*
>
> Amends the existing Waste Control Act of 1973 by reversing the present burden of proof so that out-of-state solid and liquid waste will be banned unless the Department issues regulations permitting same. *No doubt this approach was taken—as opposed to an absolute ban—so as not blatantly to traverse the commerce clause of the Federal Constitution.*"
>
> • • •

23. This was specifically admitted by Appellees in their Answer to the Complaint filed in this action (A10, 97).

24. When S. 2367 was originally introduced, the clause ". . . except garbage to be fed to swine in the State of New Jersey," was not in the bill.

25. See footnote 18, *supra*.

> "E. *Departmental Comments—*
>
> *Out-of-state waste is clearly a problem but it is not necessarily insurmountable.* The Bureau of Solid Waste reports that *the major difficulty is that New York 'garbage' competes with the landfill sites in heavily populated areas which will tap out within a few years, in any case.* Thus, whereas such waste comprises no more than a small percentage of the total waste collected in the state, it is approximately 25% of the waste disposed in the New Jersey portion of the New York-New Jersey Metropolitan area. This is the truly critical region for solid waste. However, liquid waste from New York and Pennsylvania may even be needed by New Jersey processing plants, so as to reduce their per unit costs. The bill will clearly permit the Department to issue regulations allowing same where necessary or desirable."
>
> • • •
>
> (Emphasis added)

S. 2367 was passed by the Senate on November 19, 1973, and by the Assembly on November 26, 1973. While the bill was pending before the Governor for his review, Richard W. DeKorte, Counsel to the Governor, wrote to David Quient, Esquire, City Attorney for Appellant City of Glen Cove (A47-48), saying:

> • • •
>
> "Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

S. 2367 was signed by the Governor on January 2, 1974, *P. L.* 1973, *c.* 363.

Since the prohibitory legislation emanated from the Governor's office, it can be reasonably expected that the Governor's Counsel was well-versed in its *raison d'etre.*

The evidence, in its cumulative effect, overwhelmingly demonstrates that *P. L.* 1973, *c.* 363 was not adopted as a valid health measure, but was intentionally designed to directly burden and discriminate against interstate commerce. Indeed, Appellees readily admit that a purpose of the statute was to preserve landfill acres in New Jersey for solid waste generated in said state (A21,100).

In *Penna. v. West Virginia,* 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers".

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.,* 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State,* and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." (Emphasis added)

See also *City of Altus, Oklahoma v. Carr,* 255 *F.* Supp. 828 (W. D. Tex. 1966).

The potential for retaliation is not a mere theoretical possibility in the present case. The Commonwealth of Pennsylvania has already enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. 35 *P. S.* § 6007 *et seq.* The legislation was intended to be retaliatory in operation and effect (A62).

Exclusionary and retaliatory legislation is destructive to the achievement of national goals. Such enactment places the well-being of a few over the well-being of the whole, and can lead to the kind of isolationism that the commerce clause was intended to prevent.

Mr. Justice Cardozo expressed the principle with great eloquence. In declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a price lower than the minimum prescribed by the New York statute, he commented:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."
>
> *Baldwin v. G. A. F. Seelig*, 294 *U. S.* 511, 523 (1935).

A statute which facially prohibits entry without regard to condition is ". . . hostile in conception as well as burdensome in result". *Polar Ice Cream & Creamery Co. v. Andrews*, 375 *U. S.* 361, 377 (1964). It represents discrimination of the most basic kind, and cannot be tolerated to stand.

2. Legitimate Local Purpose.

Despite the comprehensive regulation of the solid waste collection and disposal process by various state administrative agencies, the New Jersey Supreme Court found that *P. L.* 1973, *c.* 363 served a legitimate local purpose. This conclusion is without reasonable basis.

In 1958, the New Jersey Public Health Council adopted Chapter VIII-Refuse Disposal as part of the State Sanitary Code pursuant to authority conferred by *N. J. S. A.* 26:1A-7. Chapter VIII prohibited the operation of dumps and authorized the disposal of solid waste only through use of

> "(a) sanitary landfills established, conducted, operated and maintained in accordance with standards set forth in Regulation 4, 5, and 6 of this Chapter
>
> OR
>
> (b) Incinerators constructed, operated and maintained in accordance with Code or Regulation of the New Jersey Air Pollution Control Commission.
>
> (c) Other methods of disposal as may be approved by the State Department of Health."

The regulations collected in Chapter VIII-Refuse Disposal, were adopted, consistently with the mandate in *N. J. S. A.* 26:1A-7, ". . . to preserve and improve the public health in this State." [26]

On April 13, 1970, the Public Health Council adopted a revision of Chapter VIII of the State Sanitary Code which substantially expanded the previously-existing regulations. The authorized methods of disposal were not changed or altered in any way, but additional operational requirements were imposed to further protect the public health. On April 22, 1970, the functions, powers and duties of the Public Health Council were transferred to and vested in the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection, *N. J. S. A.* 13:1D-7a. Chapter VIII of the State Sanitary Code was not repealed by the administrative reorganization; it remained in full force and effect, under the jurisdiction of the Department of Environmental Protection, *N. J. S. A.* 13:1D-15, 13:1E-66.

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26. *New Jersey State Sanitary Code* (Trenton: New Jersey State Department of Health, rev. September 1963) p. 1.

Approximately three months later, on July 31, 1970, the *New Jersey Solid Waste Management Plan* was published. Said Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey, reported with candor:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm.
>
> • • •
>
> "The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refunse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards." [27]

Chapter VIII of the State Sanitary Code continued in effect until July 1, 1974, when it was superceded by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* In adopting said Rules, the Commissioner of the Department of Environmental Protection commented: "No rule was altered in such a way as to provide less protection to the public health, safety or welfare than provided by the Chapter VIII regulations," (A126).

The principal environmental engineer of the Bureau of Solid Waste management was more direct in his assessment of the Rules. During a deposition conducted on March 13, 1974, he grudgingly admitted that the Rules as

27. *New Jersey State Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) at pp. 2 and 78.

then proposed were entirely adequate to protect the health, safety and welfare of the people of New Jersey and the quality of its environment (A109).

The Rules, which are extremely comprehensive in nature, provide that the exclusive methods by which solid waste may be disposed in New Jersey are through use of:

> "a. Sanitary landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.
>
> "b. Incinerators constructed, operated and maintained in accordance with Regulations of the New Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.
>
> "c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter."
>
> *N. J. A. C.* 7:26-2.1.2

Dumps are expressly prohibited. *N. J. A. C.* 7:26-2.1.1.

No person may engage in the disposal of solid waste in New Jersey without having first obtained approval of a registration statement and engineering design from the Department of Environmental Protection. *N. J. A. C.* 7:26-2.2.2; 7:26-2.2.3. Designs for sanitary landfills, incinerators, and other methods of disposal must be prepared by a New Jersey licensed professional engineer and submitted to the Bureau of Solid Waste Management for its review, *N. J. A. C.* 7:26-2.4. In addition to other requirements, each engineering design for a sanitary landfill must include (a) a designation of the property or portion thereof

for which approval is being sought; (b) contours and proposed final elevations; (c) proposed sequence of development; (d) soil borings; (e) soil classifications; (f) soil profile and aquifer information; (g) geological and ground water data; (h) identification of registered wells and public buildings within a one-half mile radius; (i) surface and subsurface drains; (j) leachate collection system, if applicable; (k) profile views for excavation, and grades and elevations for dikes, berms or other pollution protection devices or techniques; (l) proposed landscaping, beautification and screening techniques; (m) gas venting and monitoring system; (n) ground water monitoring wells; and (o) estimated capacity. *N. J. A. C.* 7:26-2.12.2.

Special emphasis is placed upon the control and elimination of ground and surface water pollution at sanitary landfill sites. To accomplish this objective *N. J. A. C.* 7:26-2.5.4 provides, in pertinent part:

> "No new sanitary landfill shall be conducted, nor shall an existing landfill continue to be conducted where the solid waste, in whole or in part, or the leachate produced as a result of the sanitary landfill, impairs the quality of the surface or ground waters of this state to a degree that would degrade the quality of either the surface or ground waters of this state beyond the classification established by the Department for the surface water in question or the potable water standard established by the Department in the case of ground water." (A247)

In addition, *N. J. A. C.* 7:26-2.5.22 requires the installation of ground water monitoring systems as a condition precedent to the operation of a new sanitary landfill or the expansion of an existing facility:

> "No new solid waste facility shall begin operations without first installing a ground water monitoring system constructed and located in accordance with instructions furnished by the Department. Further, no new facility shall begin operations prior to obtaining ground water samples, and analyses thereof, for the purpose of establishing baseline information." (A249)

The Department of Environmental Protection can require the installation of an impermeable liner (A282), where necessary, to create a barrier between the deposited solid waste and exposed surfaces that would otherwise be unsatisfactory for land disposal purposes.

Gas venting systems must be installed at every existing sanitary landfill site, and at every new facility, as a condition of continued operation. In this connection, *N. J. A. C.* 7.26-2.5.21 provides:

> "New facilities shall install the gas venting and monitoring systems indicated on the approved engineering design prior to operating. A phase-in of the system is permitted if so indicated on the approved engineering design. Existing facilities shall be required to design, obtain departmental approval of the design, and implement a gas venting and monitoring system when so ordered by the Department as a result of the detection of landfill gases beyond the perimeter of the designated fill area. Detection may be by ground probing or vegetation damage. The recovery of landfill gases for use as a fuel is not prohibited by this subsection. In no case shall the accumulation of combustible gases in excess of their lower explosive limits within confined

> structures on or adjacent to the facility be permitted." (A249)

In addition to the aforesaid, a sanitary landfill must effectively control scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.5.6, dust, *N. J. A. C.* 7:26-2.5.7, odor, *N. J. A. C.* 7:26-2.5.8, and insects and rodents, *N. J. A. C.* 7:26-2.5.12. Other stringent and carefully conceived operational requirements, too numerous to mention, are also imposed by the Rules.

The situation with respect to the regulation of incineration is much the same. The construction and operation of incinerators for solid waste disposal is governed by both the Rules of the Bureau of Solid Waste Management, and by the Rules of the Bureau of Air Pollution Control, *N. J. A. C.* 7:27-11.1 *et seq.*

No person may construct a new incinerator, or use a new or altered incinerator, unless a "Permit to Construct, Install or Alter Control Apparatus or Equipment" and a "Certificate to Operate Control Apparatus or Equipment" have first been obtained from the Bureau of Air Pollution Control, Department of Environmental Protection, *N. J. A. C.* 7:27-11.4. In order to assure that incinerators and control equipment will not pollute the air,

> "The Department may require such details regarding the equipment or control apparatus as it considers necessary to determine that the equipment or control apparatus is designed to operate without causing a violation of any provisions of the New Jersey Air Pollution Control Act or any provisions of codes, rules or regulations promulgated hereunder. . . ."
>
> *N. J. A. C.* 7:27-8.4(b)

The Rules of the Bureau of Air Pollution Control contain specific emission standards with respect to particles emission, smoke emission, unburned waste or ash emission, and odor emission, *N. J. A. C.* 7:27-11.4. Most importantly, an incinerator cannot be constructed or used unless it is ". . . effective for the purpose of air pollution control". *N. J. A. C.* 7:27-11.2. See also *N. J. A. C.* 7:27-5.2(a) being a regulation of general applicability which prohibits the emission into the outdoor atmosphere of substances in quantities which shall result in air pollution. Open burning is specifically prohibited, *N. J. A. C.* 7:27-2.3.

An incinerator cannot be used for solid waste disposal purposes until an engineering design prepared by a New Jersey licensed professional engineer has been filed with and approved by the Bureau of Solid Waste Management. Such design must contain information with respect to (a) rated capacity, (b) current and anticipated daily loadings, (c) unloading and storage facilities, (d) emergency storage facilities, (e) alternate unloading locations, (f) rodent and odor control techniques, (g) daily residue tonnage, (h) disposal location of residue, and (i) accompanying recycling or reclamation activity, if any. *N. J. A. C.* 7:26-2.12.3.

The Rules regulate the operation as well as the design of incinerator facilities. Areas where putrescible waste is stored or deposited must be cleaned within each twenty-four hour period, and no such waste may be stored longer than twenty-four hours without acceptable treatment to prevent putrefaction. *N. J. A. C.* 7:26-2.11.1; 7:26-2.11.2. A program to control the scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.11.3, dust, *N. J. A. C.* 7:26-2.11.4, odors, *N. J. A. C.* 7:26-2.11.5, and

insects and rodents, *N. J. A. C.* 7:26-2.11.8 must be implemented at each facility.[28]

The New Jersey Department of Environmental Protection is not the only state administrative agency authorized to supervise the operation of solid waste facilities. Regulatory control is independently conferred upon, and may be exercised by, the Board of Public Utility Commissioners. *N. J. S. A.* 48:2-23 provides as follows:

> "The board may, after hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and to maintain its property and equipment in such condition as to enable it to do so."

It is within this regulatory framework that the New Jersey Supreme Court upheld *P. L.* 1973, *c.* 363, as being a reasonable, non-discriminatory exercise of the State's police power which does not unduly burden interstate commerce.

Although a state has a responsibility to protect its people and their property, it is well-established that a police regulation which affects interstate commerce must not go beyond the necessities of the particular case. *Reid v. Colorado*, 187 *U. S.* 137, 151 (1902); *Smith v. St. Louis and Southwestern Ry. Co.* 181 *U. S.* 248, 256 (1901).

The prohibition imposed by *P. L.* 1973 *c.* 363, § 2, is not directed against treatment or disposal at all: it is specifically directed against entry. The effect of the statute

28. For other regulations, see *N. J. A. C.* 7:26-2.11 entitled: General Operational Requirements for Incinerators, Transfer Stations, Processing Facility, and Resource Recovery Facilities.

is both to prohibit entry and to prevent every administratively authorized and regulated form of disposal, whether expected to do injury to the inhabitants of the state or not.

Even if the New Jersey Supreme Court was correct in finding that the preservation of land represented a legitimate local purpose.[29]

> ". . . extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 472.

then there was still no basis to prohibit (a) entry, and (b) other authorized and regulated forms of disposal, including resource recovery and incineration.

The statute went far beyond what was reasonable and necessary in order to accomplish its purpose.

It is interesting that "garbage to be fed to swine in the State of New Jersey" is statutorily excepted from the otherwise unlimited embargo imposed by *P. L.* 1973, *c.* 363. The word "garbage" is not synonymous or co-extensive with, but is narrower than, the term "solid waste". It is a word of art, separately defined in New Jersey as:

> ". . . all putrescible animal and vegetable wastes resulting from the handling, preparation, cooking and consumption of . . . food. . . ."
>
> *N. J. A. C.* 12:100-2.1 (Emphasis added)

29. The conclusion appears to be based upon the premise that sanitary landfills "degrade" land, and that acreage should not be devoted to that purpose. There is no evidence, either in the record or among the competent authorities, to support this view. Quite to the contrary, the New Jersey State Solid Waste Management Plan commented that properly designed and constructed sanitary landfills are frequently an asset to the community.

Putrescible waste [30] has a greater potential for harm to the public health than bulky waste,[31] construction waste [32] or demolition waste.[33] Yet garbage to be fed to swine can freely *enter* New Jersey, while non-putrescible wastes and garbage intended for other purposes cannot.

Although *P. L.* 1973, *c.* 363 contains a Legislative finding

> ". . . that the public, health, safety, and welfare require that the treatment and disposal within this State of *all* wastes generated outside of the State be prohibited",
>
> *N. J. S. A.* 13:1I-9. (Emphasis added)

the Commissioner of the Department of Environmental Protection is specifically empowered to find that the entry of solid and liquid waste collected in another state

> ". . . can be permitted without endangering the public health, safety and welfare. . . ."
>
> *N. J. S. A.* 13:1I-10.

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30. *N. J. A. C.* 7:26-1.4.46—"Any waste liable to enter into a state of putrefaction, the typically anaerobic splitting of proteins by bacteria and fungi with the formation of foul-smelling, incompletely oxydized products."

31. *N. J. A. C.* 7:26-1.4.3—"Large items of solid waste which because of their size or weight requires handling other than normally used for municipal solid waste. Bulky waste includes but is not limited to such items as tree trunks, auto bodies, demolition or construction material, appliances, furniture, and drums."

32. *N. J. A. C.* 7:26-1.4.14—"Waste building material and refuse resulting from construction, remodeling, and repair operations on houses, commercial buildings, pavements, and other structures."

33. *N. J. A. C.* 7:26-1.4.17—"Waste generated from the razing of buildings, factories, and other man-made structures, including streets, roads, and fences."

This presents a paradox of the first order: if the prohibition against treatment and disposal of out-of-state wastes is actually required to protect the public health, safety and welfare, as found by the legislature, then a delegation of power to the Commissioner of the Department of Environmental Protection to permit and regulate the entry of wastes for treatment and disposal is inconsistent and unexercisable; conversely, if the Commissioner determines, pursuant to the power delegated to him by the legislature, that wastes generated in another state can enter New Jersey without adversely affecting the public health, safety and welfare, then the legislative finding is erroneous.

Sixteen days after the enactment of *P. L.* 1973, *c.* 363, and in accordance with the authority granted to him in said legislation, the Commissioner adopted *N. J. A. C.* 7:1-4 as an emergency regulation to become effective on the same date as the statute, February 1, 1974. Although said rule followed *P. L.* 1973, *c.* 363 in declaring a general prohibition against the entry into New Jersey of solid or liquid waste collected outside the State,

> "No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State,"

certain designated wastes including pesticides, hazardous waste and chemical waste entering the State solely for processing or treatment were excepted from the generalized entry ban. *N. J. A. C.* 7:1-4.2. This action by the Commissioner was exceedingly significant for at least two reasons: (a) contrary to a *contemporaneous* legislative finding, it demonstrated that the public health, safety and

welfare, in actuality, did *not* require that the *entry* of *all wastes* generated outside the State be prohibited, and (b) if substances noxiously designated "hazardous waste" could be carried into New Jersey and treated therein *without further regulation of transportation*, then it follows that the *mere entry and treatment* of any other less hazardous waste *does not* endanger the public health, safety and welfare.

The legitimacy of the legislative finding in *P. L.* 1973, *c.* 363, § 1 was implicitly challenged by the Commissioner by the adoption of *N. J. A. C.* 7:1-4. Said emergency regulation was predicated upon an immediate serious threat to the public health, safety and welfare if certain solid and liquid wastes were excluded from New Jersey (A93):

> "WHEREAS, the *imminent ban upon the importation* into this State *of wastes* intended for resource recovery and recycling facilities, and of those hazardous chemical, pesticide, bulk liquid and bulk semi-liquid wastes intended for treatment, processing or recovery facilities *presents both and immediate and long-term peril to public health, safety and welfare* . . . ." (Emphasis added)

Part of the "peril" identified by the Commissioner was the economic survival of certain solid waste facilities (A93):

> "WHEREAS, the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes frequently requires the use of elaborate processes and equipment; and

> "WHEREAS, it is apparent that the *economic survival* of solid waste facilities utilizing such elaborate processes and equipment for the proper treatment, processing or recovery of . . . wastes generated within the State is dependent upon the acceptance of those wastes generated or collected outside the territorial limits of this State; . . . ." (Emphasis added)

The Commissioner's remarks with respect to economic survival are especially noteworthy and equally applicable to sanitary landfill and incineration sites where the cost of land, equipment and environmental controls is staggering (A264, 270 and 282); a fact equally recognized by the New Jersey legislature, *P. L.* 1975, *c.* 326, § 3, amending *N. J. S. A.* 13:1E-2c.

The inherent danger involved in adopting a statute which excludes all commerce, subject to a condition subsequent, is that articles of commerce may, unintentionally or otherwise, be unconstitutionally caught in the prohibition. That is precisely what has happened here. Of the many examples which might be postulated, one will suffice.

Automobile bodies are included in the general category of "bulky waste" as defined by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1.4.3. The word "disposal" is not limited to final disposition, but also contemplates storage, treatment, utilization and processing, *N. J. A. C.* 7:26-1.4.20. Thus, the transportation of automobile bodies into New Jersey for storage pending subsequent shipment to an out-of-state site is prohibited by *P. L.* 1973, *c.* 363 and by *N. J. A. C.* 7:1-4.

It is clear, therefore, that the power conferred upon the Commissioner to permit the entry of solid and liquid wastes which are otherwise prohibited by *P. L.* 1973, *c.* 363 does not save the statute from an attack on Commerce

Clause grounds.[34] Rather, it illustrates the critical weakness and manifest impropriety of the statute. All out-of-state wastes are excluded until the Commissioner affirmatively acts. The Commissioner is neither compelled to act nor to deal with solid and liquid wastes collected within the state. And once adopted, regulations may be amended or repealed, at will, with relative ease.[35]

On June 28, 1974, approximately six months after the enactment of *P. L.* 1973, *c.* 363, the Commissioner of the Department of Environmental Protection adopted the Rules of the Bureau of Solid Waste Management. According to the principal environmental engineer of the Bureau, the collection and disposal of solid waste in accordance with said rules does not pose any substantial or material threat to the health, welfare and safety of the people of New Jersey or to the quality of the environment (A109). That being the case, one is hard-pressed to discern the reason why the Commissioner, by his inaction, permits the exclusion of out-of-state waste to continue. Since there is no qualitative difference between solid waste which originates or is collected outside the

34. Although the New Jersey Supreme Court appeared to view *N. J. A. C.* 7:1-4 as having a "confining effect" on *P. L.* 1973, *c.* 363, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 468, Appellants respectfully submit that powers cannot be delegated to a state administrative agency by an unconstitutional statute. Even if they could, the emergency regulations adopted by the Commissioner continue to exclude accepted subjects of commerce.

35. *N. J. A. C.* 7:1-4 was adopted pursuant to that section of the New Jersey Administrative Procedure Act, *N. J. S. A.* 52:14B-1 *et seq.* which dispenses with notice and an opportunity to be heard prior to the adoption of a regulation if an imminent peril is identified, *N. J. S. A.* 52:14B-4(c):

> "If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable to adopt the rule."

State of New Jersey and that which originates or is collected within the State (A21, 100), the discriminatory treatment against interstate commerce is inexplicable. For example, if solid waste collected in New Jersey can be incinerated in accordance with regulations adopted by the New Jersey Department of Environmental Protection, what harm can be done by permitting the incineration of qualitatively identical wastes collected outside the State? To ask the question is to answer it.

The disposal of solid waste in accordance with presently existing laws and regulations and in conformance with sound engineering practices[36] does not present a serious threat to health or environmental safety. Appellees have never, by affidavit, disputed this conclusion, which is generally accepted throughout the United States.

In *Horn v. Community Refuse Disposal, Inc.*, 186 *Neb.* 43, 180 *N. W.* 2d 691 (Sup. Ct. 1970), plaintiffs brought an action to enjoin the establishment and operation of a sanitary landfill. The court denied the application saying:

> "The evidence is persuasive that it is possible to operate a sanitary landfill so that it will not emit offensive odors, pollute ground waters, or be attractive to rodents. The rules and regulations adopted in 1969 enforcible by the State Department of Health under statutory authority are reasonably designed to produce that result."
>
> *Horn v. Community Refuse Disposal*, 180 *N. W.* 2d, *supra*, at 692.

The overwhelmingly accepted rule is that incinerators and sanitary landfills which are properly maintained and

36. A design prepared by a professional licensed engineer must be submitted to and approved by the Bureau of Solid Waste Management as a condition precedent to the operation of any new sanitary landfill or the expansion of any existing facility. *N. J. A. C.* 7:26-2.2.3.

operated are not public nuisances; *Wood v. Town of Wilton*, 156 *Conn.* 304, 240 *A.* 2d 904 (Sup. Ct. 1968); *Rocchi v. Zoning Bd. of App. of Town of Glastonbury*, 157 *Conn.* 106, 248 *A.* 2d 922 (Sup. Ct. 1968); *Myers v. City of Hagerstown*, 214 *Md.* 312, 135 *A.* 2d. 147 (Ct. App. 1957) (and cases therein cited); Annotation, *"Public Dump as Nuisance"*, 52 *ALR* 2d 1134.

All too often, the words "sanitary landfill" and "dump" are confused with one another.[37] They are very different entities.[38] The Rules of the Bureau of Solid Waste Management define a sanitary landfill as:

37. See *Municipal Refuse Disposal*, 3rd ed. (Chicago: Public Administration Service, 1970), pg. 93, wherein it is stated:

> Although the sanitary landfill as a method of refuse disposal was given a clean bill of health many years ago, its acceptance by the public is still far from unanimous. The public has too often heard the terms "landfill", "dump", and "sanitary landfill" used interchangeably and does not understand the difference between a sanitary landfill and a landfill or dump. 'Unfortunately there are too many disposal facilities labeled "sanitary landfills" which are glaringly deficient in some of the essential elements. The 1968 National Survey shows that 94 per cent of all landfill refuse disposal projects fall short of complying with all criteria for fully acceptable operations. The resulting public image of sanitary landfills has been damaging.
>
> A well-located, well-designed, and efficiently operated sanitary landfill meets public health standards and requirements for control of air and water pollution, fire, and nuisances:
>
> 1. Vector breeding or sustenance is prevented by eliminating harborage and food supply for rats, flies, and other vermin.
>
> 2. Air pollution by dust, smoke, and odor is controlled.
>
> 3. Fire hazards are controlled during operational phases. (They are negligible in a completed fill.)
>
> 4. Pollution of surface and ground waters is precluded.
>
> 5. All nuisance factors are effectively controlled; i.e., the system is aesthetically acceptable and noise is kept to a minimum.

38. Pictorial illustrations of a "sanitary landfill" and a "dump" appear on the sheet facing this page.

Open Dumping

"The land disposal site employing an *engineered method of disposal* of solid waste *in a manner that minimizes environmental hazards,* including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequent basis."

N. J. A. C. 7:26-1.4.54 (Emphasis added)

A dump, on the other hand, is separately defined as:

"A land site at which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers."

N. J. A. C. 7:26-1.4.23.

When dumps were determined to be hazardous to human health, their operation was entirely prohibited in the State of New Jersey, *N. J. A. C.* 7:26-2.1.1. No distinction was made between dumps which accepted for disposal solid waste collected within New Jersey and those which accepted waste collected outside the State. The regulation acted in a non-discriminatory, even-handed manner in addressing a legitimate public problem. It was the method of disposal which posed a substantial threat to public health and environmental quality, *not* the substances disposed of or the place of their origin.

Environmental hazards are minimized by the sanitary landfill disposal method, and by incineration, due to the emphasis placed upon design and sanitary operation. Origin of wastes is not related to these criteria. The de-

gree to which a disposal mode presents a threat to public health and environmental quality is entirely within the regulatory control of the State.

The legitimate local interests of the State have already been protected, without exclusion, by the adoption of state administrative regulations applicable alike to intrastate commerce and interstate commerce.

3. Effect Upon Interstate Commerce.

The direct burden imposed upon interstate commerce by the adoption of *P. L.* 1973, *c.* 363 is obvious and severe. Prohibitory legislation affects interstate commerce in a most basic and fundamental sense. As stated by Mr. Justice McKenna in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S., supra,* at 249, ". . . to prohibit interstate commerce is more than to indirectly affect it."

P. L. 1973, *c.* 363 directly prohibits the interstate disposal of solid and liquid waste. It is not unique in that respect. Since 1969, seven states have adopted laws which, to varying degrees, prohibit the disposal of solid waste collected in another state.[39] Three other states have imposed various regulatory limitations.[40] The effect of these enactments is to retard, if not to entirely obviate, the national goal of achieving interstate cooperation in confronting the solid waste disposal problem (A57, 58).

More than ten years ago, Congress identified solid waste disposal as a problem of national concern. In 1965

39. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

40. Delaware, Illinois and Louisiana.

it enacted the Solid Waste Disposal Act, *Pub. L.* 89-272, for the purpose of promoting "a national research and development program for new and improved methods of proper and economic solid waste disposal", 42 *U. S. C.* § 3251(b)(1), and providing financial resources to accomplish same. Five years later, the Resource Recovery Act of 1970, *Pub. L.* 91-512 was adopted to underscore the importance of resource recovery. In both cases, the Secretary of Health, Education and Welfare (now the Administrator of the Environmental Protection Agency) was directed to ". . . encourage cooperative activities by the States . . . encourage, where practicable, interstate, interlocal, and regional planning . . .; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal". 42 *U. S. C.* § 3254.

Prohibitory and retaliatory legislation is clearly alien to the expressed congressional intent. It creates a climate attuned to inhibit rather than to promote the national interest; and it will lead to an escalation in the cost of solid waste collection and disposal, which is already significant.

An estimated $3 billion was spent annually for solid waste collection and disposal at the time of the adoption of the Solid Waste Disposal Act, 42 *U. S. C.* § 3251 *et seq.*, 1965 *U. S. Code, Cong. and Adm. News,* p. 3614. The cost of said service reached an estimated $4.5 billion by 1970, 1970 *U. S. Code, Cong. and Adm. News,* p. 4553. The House Report noted:

> "The greatest amount of the moneys spent goes for *collecting* solid waste and *transporting* it to some place where it may be dumped or burned."
>
> 1970 *U. S. Code, Cong. and Adm. News,* p. 4553.

An identical conclusion was reached independently by the Bureau of Solid Waste Management (A75) which noted: ". . . The collection and haulage of our solid waste accounts for 75 to 85 percent of the total collection/disposal costs. . . ."

Although the New Jersey Supreme Court held that *P. L.* 1973, *c.* 363 did not discriminate against interstate commerce in an economic sense, it recognized the obvious economic impact of its decision upon interstate commerce:

> "The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 476.

The New Jersey Department of Environmental Protection estimates that 1.5 million tons of solid waste originating outside of the State was buried in New Jersey in 1971. *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 461. If the cost of disposing of solid waste is increased at the same "modest" rate of five dollars per ton postulated for the City of Yonkers, then yearly disposal costs for out-of-state waste would increase by a staggering $7.5 million. Furthermore, Appellant City of Philadelphia has averred that the cost of incineration facilities complying with federal and state air pollution standards would cost approximately $100,000,000 (A264). These costs are hardly insignificant.

But that is not all. Economic harm will likely be suffered by New Jersey in its efforts to dispose of the solid

waste collected within its borders. Since a direct relationship exists, in land disposal of solid waste, between cost and distance to disposal site, communities located in northern New Jersey will no doubt look to southern New York and eastern Pennsylvania, rather than to southern New Jersey, when existing landfill sites situated in the northern part of the state are consumed in an estimated 3 years. *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J., supra,* at 461. These communities will be immediately foreclosed from seeking disposal alternatives in Pennsylvania, either now or in the future, because retaliatory legislation has been adopted by that Commonwealth, 35 P. S. § 6007. Furthermore, the prohibition against interstate treatment and disposal of solid waste will inevitably lead to the diminishment and termination of sanitary landfill business in New Jersey (A44, 254, 271, 281), with attendant increase of disposal costs to persons presently relying upon said sites.

According to estimates prepared by the New Jersey Department of Environmental Protection, the exclusion of out-of-state solid waste would increase the anticipated *existing* landfill life in New Jersey by a mere 8%. This potential loss, which is already inconsiderable, is of no special concern in light of available sites which may hereafter be developed for sanitary landfill purposes. In an affidavit submitted to the trial court, it was unequivocally stated by two New Jersey licensed professional engineers (A61) that there is no scarcity of land in the State which could be used for solid waste disposal:

> "There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill purposes which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection."

No affidavit has been filed to refute the truth or accuracy of that assertion, although many opportunities have been presented to do so.

Engineering designs for sites capable of handling millions of tons of solid waste have already been filed with the New Jersey Department of Environmental Protection or are presently being developed (A275-289). This is simply a reflection of the immutable principle that private industry responds to consumer demand.

Ironically, as of March 13, 1974, the New Jersey Department of Environmental Protection made no effort to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey (A112), or to determine the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A115). It is distressing indeed that the method adopted by the State to provide for the disposal of its own solid waste is to prohibit the disposal, in *privately owned and operated* sanitary landfills, of waste collected or originating outside the State.

Tonnage figures associated with solid waste disposal appear at first glance and without explanatory remarks, to be overwhelming. They are, in reality, of no special significance. A sanitary landfill site consisting of 200 acres, filled to a depth of 50 feet, and operated in compliance with the regulations of the New Jersey Department of Environmental Protection, would remain fully operational to dispose of 10,000 tons of solid waste per week for a period of approximately 12.4 (111) to 15 years (A61, 275).

Assuming for the sake of argument, that approximately 10,000 tons of solid waste per week are being brought into New Jersey from the City of Philadelphia and disposed of in this State (A70), it would take at least 12.4 years to fill a single 200 acre site! And such site could thereafter be

used for industrial, commercial, recreational, or green acres purposes (A276-277).

In wording and in practical effect, *P. L.* 1973, *c.* 363 imposes a direct and intolerable burden upon interstate commerce.

C.

Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting Appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional as a matter of law on the ground that same discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N. J.* 57, 74 (1954), continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

> "It is designed to provide a prompt business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> • • •
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminat-

> ing care so as not to defeat a summary judgment if the movant is justly entitled to one." (Emphasis added)

Appellants motion for summary judgment was based only upon those Commerce Clause issues which did not involve questions of material fact. They acknowledged the existence of other issues upon which summary judgment could not be granted (A120).

The trial judge's opinion reveals his determination as a matter of federal constitutional law, (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (A216) Appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. 1, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment. If they did, and leave to file an interlocutory appeal was granted by the Superior Court, Appellate Division, the only relief to which Appellees would have been entitled was a partial summary judgment and a remand for a hearing of the numerous remaining issues of material fact.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon interstate commerce. They were also deprived of their right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result was incomprehensible. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact (A121-122):

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any

of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints*.

• • •

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.* 363 was not being attacked on Commerce Clause grounds alone.[41]

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate. . . ." (A340). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that

41. Separate counts in the complaint challenged *P. L.* 1973, *c.* 363 on due process, equal protection of the laws and impairment of the obligation of contract grounds, among others.

P. L. 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment initially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

As a practical consequence of this action,[42] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme

42. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who stayed the mandate of the New Jersey Supreme Court.

Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean,* 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.,* 339 *U. S.* 306 (1950).

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue of material fact raised by their complaint prior to the final determination. *Rhodes v. Houston,* 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert. den.* 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S., supra,* at 678. It was asserted a second time less than two weeks later in a motion addressed to the New

Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants' consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court, (A343),

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not reasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

CONCLUSION.

The New Jersey Supreme Court has decided an issue of national importance in a way not in accord with the decisions of this Court, and in conflict with decisions of other state and federal courts which have recently decided cases involving environmental questions. It has also so far departed from the accepted and usual course of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

It is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional on the ground that same directly burdens and discriminates against interstate commerce; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

We hereby certify that on this 3rd day of June, 1976, three copies of the Brief of Appellants and the Single Appendix were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey 08625; and to William C. Brashares and Paul M. Laurenza, Cladouhos & Brashares, attorneys for *amicus curiae,* National Solid Wastes Management Association, at their law office located at 1750 New York Avenue, N.W., Washington, D. C. 20006.

We further certify that all parties required to be served have been served.

By .....
HERBERT F. MOORE

By .....
ARTHUR MEISEL

Supreme Court, U. S.
FILED
JUL 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

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IN THE

Supreme Court of the United States

OCTOBER TERM—1975

No 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEES

Question Presented

Does the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution require a state acting to fulfill its obligation to provide disposal facilities for solid waste generated within its boundaries also to allow such facilities to be used for waste originating in other states?

Counter-Statement of the Case

On January 2, 1974, P.L. 1973, c. 363 was signed into law by the Governor of New Jersey to be effective February 1, 1974. This legislation contains a legislative finding that:

> ". . . since the enactment of P.L. 1973, c. 39 (C.13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9.

Based on this finding the legislation directs that:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the 'Waste Control Act,' P.L. 1973, c. 39." N.J.S.A. 13:1I-10.

Pursuant to the authority of chapter 363 the Commissioner of the New Jersey Department of Environmental Protection promulgated rules and regulations to be effective February 1, 1974, concurrently with the effective date of the statute, which provided that:

> "No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
>
> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility pro-

vided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State." N.J. A.C. 7:1-4.2 (App. 96).

The complaint in this matter, which was filed with the Superior Court of New Jersey, Law Division, on January 22, 1974, sought a declaration that chapter 363 is violative of the Constitutions of the United States and the State of New Jersey and temporary and permanent injunctive relief restraining enforcement of the law (App. 7-29). The case was brought before the trial court on cross-motions for summary judgment (App. 118-119).

In support of the State's cross-motion for summary judgment, a report was submitted, entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management," which appropriately describes the crisis in solid waste disposal leading to the enactment of the ban on the dumping of waste originating out of state. It states in pertinent part:

> "Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce

> leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating.
>
> • • •
>
> "There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered 'marginal.' Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.
>
> "Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequently likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations in the groundwater level, tidal influences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill 'sponge.'

"Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

• • •

"While examples of leaching sanitary landfills have been studied and documented for many years, only recently have researchers begun to study leachate generation in detail. As recently as 1972, the U.S. Environmental Protection Agency, in its report entitled 'Sanitary Landfill Design and Operation,' stated the following:

> 'Some investigators believe that even in a sanitary landfill, leachage production is inevitable and that some leachate will eventually enter surface water or groundwater. This has not been proven but neither has the opposite view. The present philosophy held by the Office of Solid Waste Management Programs, most State solid waste control agencies, and many experts in the field is that through sound engineering and design, leachate production and movement may be prevented or minimized to the extent that it will not create a water pollution problem.'

"One particularly disconcerting feature of leachate production is the time delay created by the absorptive character of the wastes. Frequently, landfills do not begin leaching until some time after the fill has been completed and the waste has reached its saturation level. Climatic conditions in New Jersey are favorable to leachate production and, unless extreme measures are taken to prevent any liquid from infiltrating the waste, leachate will be produced in New Jersey's landfills. The problem then becomes one of preventing the pollution of our ground and surface waters by the leachate.

"Water pollution from sanitary landfills is determined by a number of factors, including the site hydrology, geology, topography, method of operation, the type of wastes received for disposal, and other physical and chemical factors which vary from fill to fill. Clearly, then, the potential for polluting our ground and surface water resources should be a strong factor in the selection of a sanitary landfill site, and in its design and method of operation.

• • •

"Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called 'aerobic.' The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

"As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decom-

position almost half the gas present is methane. Methane is the 'natural gas' commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is no oxygen present, it does not pose an explosive threat in the fill itself. Methane is, however, much lighter than air and, therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

• • •

"The introduction of bulk liquids into a landfill can greatly affect the generation of leachate within the fill, and leaching from fills which have accepted hazardous wastes can have a particularly devastating effect on the quality of our resources. For these reasons, the proposed regulations would require any sanitary landfill which accepts such wastes to establish and maintain water monitoring facilities, and to undertake immediate corrective measures should the monitoring disclose contamination. Additionally, the proposed regulations would ban the disposal of hazardous wastes and bulk liquids at conventional sanitary landfills after March 15, 1975. This, it is felt, is sufficient lead-time for the construction of recovery, treatment and disposal facilities with sufficient safeguards to properly handle hazardous and bulk-liquid wastes.

• • •

"In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

"It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

"Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal

sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local goverment have expressed concern over the scarcity of suitable new sites.

"One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

"The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the 'Waste Control Act' (N.J.S.A. 13: 1I-1, *et seq.*) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State." (N.J.A.C. 7:26-1.8) (App. 74-75, App. 77-85).

An affidavit by the Chief of the New Jersey Bureau of Solid Waste Management, also submitted in support of the cross motion for summary judgment, further explained the precise impact of the disposal of waste originating out of state upon the solid waste crisis in New Jersey:

> "2. The figures available to the Department indicate that the present volume of solid waste being brought into New Jersey for disposal from the City of Philadelphia is approximately 10,000 tons a week.
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> "3. The figures available to the Department indicate that the volume of solid waste being brought into New Jersey for disposal from New York is signicantly in excess of 10,000 tons a week. The Hackensack Meadowlands Development Commission has found, by actual count, that 10,000 tons a week from New York were being disposed of within the Hackensack Meadowlands District alone prior to the initiation of a ban on out-of-state dumping in that area. Much of the garbage previously disposed of in the Hackensack Meadowlands District is now being disposed of elsewhere in New Jersey.
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> "5. The ban on the disposal of out-of-state waste within New Jersey will increase State-wide landfill life by approximately 8 percent. In specific areas, or with respect to specific landfills, the ban substantially increased the capacity available for disposal of wastes, in some instances as much as 50 to 100 percent. In Middlesex County an actual survey made by the Department indicated that the ban would extend landfill life in that county by 20 percent.

"6. It is extremely difficult to estimate accurately existing landfill capacity, but the Department's best estimate is that existing capacity in north Jersey is about 3 years, and in south Jersey as much as 10 years.

"7. One of the difficulties in estimating total State-wide or regional landfill capacity is that many landfills in the State are located in environmentally sensitive areas such as floodsplains, wetlands, or on State-owned public trust tidelands, and their operation may soon be limited or discontinued for environmental reasons. Such discontinuance will obviously decrease even further the availability of landfill sites for disposal of New Jersey wastes." (App. 70-71).

On the basis of the cross motions for summary judgment, the trial court concluded that waste is a proper subject of interstate commerce, that chapter 363 discriminates against such commerce and that the statute therefore violates the Commerce Clause (App. 206-213).

On appeal by the State, the Supreme Court of New Jersey found that the objective of chapter 367 was ". . . to prolong the useful lifespan of landfill areas within the state . . ." and thereby serve ". . . the needs of public health as well as endeavoring to preserve the environment." (App. 248). It further found that the legislation did not discriminate against interstate commerce, observing that ". . . the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions." (App. 248). The court therefore concluded that the Commerce Clause had not been violated: "[W]here the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action (App. 251-252).

After issuance of the opinion of the Supreme Court of New Jersey, the appellants moved the court to stay its judgment and to remand the matter to the trial court for a hearing on factual issues which they contended had not been resolved by the court's opinion (App. 260-262). This motion was strenuously opposed by the State, which urged that any issues not argued—or even noted—in the appellants' brief had been abandoned and that, in any event, all of the appellants' claims had been effectively rejected by the court. The State also urged that the appellants were improperly seeking to resurrect abandoned claims in order to secure a further injunction against chapter 363 becoming operative.

The Supreme Court of New Jersey granted the appellants' motion and remanded the matter to the trial court ". . . for such further proceeding, if any, that that court may deem appropriate . . . ." (App. 340). However, it further directed that there should be no further restraint against chapter 363 going into effect. At that point, in order to eliminate any questions as to the finality of the judgment of the Supreme Court of New Jersey and thus to pave the way for review by the Court, the appellants elected not to pursue any further proceedings before the trial court. They therefore entered into a consent order dismissing the remaining counts of their complaint (App. 342-343).

On January 9, 1976, appellants filed an appeal with the Court and on April 5, 1976, probable jurisdiction was noted.

Summary of Argument

Simply stated, the question before the Court is whether a state violates the Commerce Clause by acting to fulfill its obligation to provide disposal facilities for waste generated within its boundaries without also allowing such facilities to be used for waste originating in other states.

Although it is well established that, even without implementing legislation by Congress, the Commerce Clause imposes limitations upon the power of the states, it is also clear that the states retain broad power to legislate protection for their inhabitants in matters of local concern such as public health and the environment. When confronted with challenges to state legislation which furthers legitimate local interests but simultaneously imposes a significant burden upon interstate commerce, the Court has been called upon to make the necessary accommodation between local needs and the overriding requirement of freedom for national commerce. On the other hand, when there have been challenges to legislation which does not implicate any substantial interests in national commerce and local interests are paramount, the Court has found the Commerce Clause not to be violated.

The prohibition against the disposal within New Jersey of waste originating out of state falls within the basic power of the state to protect its environment and the health of its inhabitants. It does not have the purpose or effect of furthering New Jersey commercial interests to the economic detriment of out-of-state interests. Rather, its sole purpose and effect is to protect the environment of the state and the health of its inhabitants by reducing the overall volume of waste disposed on land within the state. Therefore, the ban on the dumping of out-of-state waste does not implicate any substantial national interest in the maintenance of an open economy which the Commerce Clause was designed to protect, but rather it represents an appropriate exercise of the basic police power of the states in furtherance of the health and welfare of its inhabitants.

ARGUMENT

POINT I

The prohibition against the disposal within New Jersey of waste originating out of state falls within the basic power of the State to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause of the United States Constitution.

It has been well established at least since *Cooley* v. *Board of Wardens,* 12 How. 299 (1851) that the Commerce Clause not only provides an affirmative grant of authority to Congress, but also ". . . even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946). It is equally well established, however, ". . . that under our constitutional scheme the States retain 'broad power' to legislate protection for the citizens in matters of local concern such as public health, . . ." *Great A.&P. Tea Co.* v. *Cottrell,* 96 S.Ct. 923, 928 (1976). As the Court noted in *H.P. Hood & Sons* v. *DuMond,* 336 U.S. 525, 533 (1949), "[t]his distinction between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of

such commerce for their economic advantage, is one deeply rooted in both our history and our law." The local concerns over which the states retain comprehensive authority, even when interstate commerce may be affected, include protection of the environment. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960); *cf. Berman* v. *Parker,* 348 U.S. 26 (1954).

The Court frequently has been confronted with challenges to state legislation which furthered legitimate local interests but simultaneously imposed a significant burden upon interstate commerce. In such cases, ". . . the Court in absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' . . . thereby attempting 'the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce.'" *Great A. & P. Tea Co.* v. *Cottrell, supra,* at 928. The leading cases in this area well illustrate how delicate this process of accommodation has been. Thus, in *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959), the Court found the Commerce Clause to be violated by a statute requiring a particular type of rear fender mudguard on trucks and trailers operated within a state, but in *South Carolina State Highway Dep't* v. *Barnwell Bros.,* 303 U.S. 177 (1938) it sustained state limitations on the weight and width of trucks and trailers. In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), the Court held state statutes imposing limitations on the length of freight cars to be violative of the Commerce Clause, but it has consistently sustained state full crew laws. See *e.g. Brotherhood of Loc. F & E* v. *Chicago, R.I. & P.R.R. Co.,* 393 U.S. 129 (1968). And in *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951), the Court held the Commerce Clause to be violated by an ordinance which prohibited the sale of

milk in a municipality unless it had been pasteurized and bottled at an approved plant located within five miles of the municipality, but in *Milk Control Board* v. *Eisenberg Farms Products,* 306 U.S. 346 (1939), it sustained a statute requiring interstate milk dealers to keep records, to post a bond to guarantee prompt payment to purchasers and to pay minimum prices to producers. Although the results varied, the Court was confronted in all these cases not only with a legitimate local interest but also an indisputable burden upon the open national market which the Commerce Clause was designed to protect. Therefore, it carefully scrutinized any burdens on the free flow of interstate commerce with the consequence that any discrimination against interstate transactions almost invariably resulted in a declaration of invalidity.

There have been other cases, however, in which no substantial interests in national commerce were implicated and local concerns were paramount. The Court has sustained state legislation under such circumstances without engaging in the delicate process of balancing required when ". . . regulation of local matters may also operate as a regulation of commerce . . . ." *Southern Pacific Co.* v. *Arizona, supra,* at 768. *Cf. Wilson* v. *The Blackbird Creek Marsh Co.,* 2 Pet. 245 (1829). Local interests are most clearly paramount in preventing the transportation into a state of articles which are inherently injurious to public health, safety and welfare. As the Court stated in *Sligh* v. *Kirkwood,* 237 U.S. 52, 60 (1915):

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well-established. Such articles, it has been declared

by this Court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. 'Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.

"'Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . . .'" 237 U.S. at 60 (citations omitted).

To the same effect, the Court said in *Pike* v. *Bruce Church,* 397 U.S. 137, 143-144 (1970):

> "[T]o the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.'"

This principle was applied in *Clason* v. *State of Indiana,* 306 U.S. 439, 442-443 (1939), where the Court upheld an Indiana statute which in effect prohibited the interstate transportation of animal carcasses not slaughtered for food. See also *Price* v. *Illinois,* 238 U.S. 446 (1915); *Asbell* v. *Kansas,* 209 U.S. 251 (1908); *Smith* v. *St. Louis*

& S.W.R. Co., 181 U.S. 248 (1901); *Rasmussen* v. *Idaho,* 180 U.S. 198 (1901); *Bowman* v. *Chicago & Northwestern Ry. Co.,* 125 U.S. 465 (1888). The Court, relying on *Sligh,* recognized that the statute was "a sanitary and health measure not intended to cause discrimination against or to burden interstate commerce. . . ." 306 U.S. at 443. The Court emphatically stated:

> "Here, contrary to what seems to be the insistence of counsel, the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.
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> "We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.
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> "There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the State from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end." *Id.* at 443-444.

It is clear that the prohibition against the disposal within New Jersey of waste originating out of state falls within the basic power of the State to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause. It does not matter whether it is found that waste intended for disposal is not a legitimate item of commerce (*Clason* v. *Indiana, supra*) or that environmental and health concerns of the State are paramount to the commercial interests of the appellants. *Cf. Robertson* v. *California,* 328 U.S. 440, 458-459 (1945). The conclusion is the same. As stated by the Supreme Court of New Jersey, ". . . where the effect upon trade and commerce is relatively slight, . . ." and ". . . where at the same time the values sought to be protected by the state legislation are . . . crucial to the welfare of its citizens . . .", there should be ". . . no hesitancy in sustaining the state action." (App. 251-252).

The transportation and disposal of waste is vastly different from the commerce in which the Founding Fathers sought to maintain an open national market. The appellants' business does not involve the sale of a product or resource, such as milk, *Hood & Sons, Inc,* v. *DuMond, supra,* or natural gas, *Pennsylvania* v. *West Virginia, supra; West* v. *Kansas Natural Gas Co., supra.* Nor does it involve an instrumentality of national commerce, such as railroads, *Brotherhood of Loc. F & E* v. *Chicago, R.I. & P.R.R. Co., supra,* or highways, *Bibb* v. *Navajo Freight Lines, supra.* Rather, their business involves the fundamental responsibility of government, under the police power, to provide for the disposal of waste generated by its inhabitants. Furthermore, the sole purpose and effect of the statute is not economic protectionism but rather to further the health and environmental interests of the State. No New Jersey commercial interests stand to gain advantage over competitors from outside the state as a

result of the ban on dumping out-of-state waste. On the contrary, among the appellants are New Jersey landfill operators. The complaint is not that New Jersey has forged an economic preference for its own commercial interests, but rather that it has denied a small group of its entrepreneurs an economic opportunity to traffic in waste in order to protect the health, safety and welfare of the citizenry at large. The ban on dumping out-of-state waste therefore does not implicate any susbtantial national interest in the maintenance of an open economy which the Commerce Clause was designed to protect.

On the other hand, the ban does serve a vital local interest in the preservation of the state's environment and the health of its inhabitants. There is a solid waste crisis in New Jersey. The nature of the crisis was stated in emphatic terms by the New Jersey Legislature and the Supreme Court of New Jersey. Section 1 of chapter 363 states:

> "The Legislature finds and determines that since the enactment of P.L. 1973, c. 39 (C. 13:1I-1, et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited."

Similarly, the Supreme Court of New Jersey, referring to its own findings in prior litigation involving solid waste problems as well as taking judicial notice of legislative studies, stated:

> "The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached 'crisis proportions' due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc.* v. *Mayor and Council of the Township of Ocean,* 64 N.J. 190, 193, 314 A. 2d 65 (1974).
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> "Compounding the shortage problem are other extremely important environmental considerations. Many existing landfills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.
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> "Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health, *Shaw* v. *Byram Township,* 86 N.J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N.J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> "• • • Sanitary landfills conducted on virgin land forever ruin the possibilty of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement gas generation, and fires make it difficult to construct structures on former landfill sites.' [*Municipal Sanitary Landfill Authority* v. *Hackensack Meadowlands Development Commission,* 120 N.J. Super. 118, 122 (App. Div. 1972); emphasis in original]'"

"We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy." (App. 231, 233, 245).

These legislative and judicial findings are solidly grounded on the Basis and Background Statement of the New Jersey Department of Environmental Protection, quoted in the Counterstatement of the Case, and the report of the State of New Jersey County and Municipal Government Commission, entitled *Solid Waste: A Coordinated Approach* (1972), of which judicial notice was taken by the Supreme Court of New Jersey (App. 233). Since there is a reasonable basis in the record for the findings of the New Jersey Legislature and Supreme Court of New Jersey, they should be accepted on appeal

by the Court. *Evco* v. *Jones,* 409 U.S. 91, 94 (1972); *Local Union No. 10* v. *Graham,* 345 U.S. 192, 197 (1952); *Welch* v. *Swasey,* 214 U.S. 91 (1909). As the Court noted in *Evco* v. *Jones, supra,* the factual findings of a state supreme court will be re-examined only in "exceptional circumstances." No showing of such "exceptional circumstances" has been made in this case.

On the contrary, the general literature on the subject, of which the Court can and should take judicial notice (*Parker* v. *Brown,* 317 U.S. 341, 363 (1943); *Sligh* v. *Kirkwood, supra,* at 61; see also Davis, *A System of Judicial Notice Based on Fairness and Convenience,* Perspectives of Law 69 (1964)), fully corroborates the findings of the Supreme Court of New Jersey concerning the danger to the environment and public health from landfills. *Gas and Leachate from Landfills: Formation, Collection and Treatment,* Proceedings of a Research Symposium held at Rutgers University, U. S. Environmental Protection Agency, March 1976 (hereinafter *Gas and Leachate*); Esmaile, Houshang, "Control of Gas Flow from Sanitary Landfills," *Journal of the Environmental Engineering Division,* Proceedings of the American Society of Civil Engineers, Vol. 101, EE4, August 1975 (hereinafter *Control of Gas Flow*); *Hazardous Waste Disposal Damage Reports,* U.S. Environmental Protection Agency, Office of Solid Waste Management Programs, June 1975; Schmalensee, Richard, Ramachandra Ramarathan, Wolfhard Ramm and Dennis Smallwood, *Measuring External Effects of Solid Waste Management,* U. S. Environmental Protection Agency, March 1975 (hereinafter *Measuring External Effects*); Blannan, Janet and Mirdza Peterson, "Survival of Fecal Coliforms and Fecal Streptococci in a Sanitary Landfill," *News of Environmental Research in Cincinnati,* U. S. Environmental Protection Agency, April 12, 1974 (hereinafter *Survival of Fecal Coliforms*); Miller,

David, Frank DeLuca and Thomas Tessier, *Ground Water Contamination in the Northeast States,* U. S. Environmental Protection Agency, June 1974 (hereinafter *Ground Water Contamination*). It has long been widely recognized that landfills are unsightly, a source of noxious odors and vermin and, with the introduction of heavy machinery, exceedingly noisy.[1] It is also now known that landfills are almost certain sources of ground and surface water pollution,[2] that they produce dangerous gases as

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[1] "Noise at sanitary landfill sites is generated by the unloading of refuse, including the operation of compactor and transport trucks as they disgorge their cargoes and the constant operation of the heavy equipment used for spreading, compacting, and covering the refuse." *Measuring External Effects, supra* at 219.

Since powerful machinery is required for spreading and compacting in order to reduce vermin, odors and later land settling, noise is a major problem, especially for landfills located in residential areas.

[2] In *Ground Water Contamination, supra,* an evaluation of water contamination in 11 northeast states including New Jersey, the authors consider that the hundreds of reported cases of such contamination represent only a small fraction of the actual pollution present. They conclude that:

> "The thousands of acres of landfills containing municipal and industrial solid wastes are an almost universal source of ground-water contamination in the region." *Id.* at 1.

Chapter IV, Landfills, gives some indication of the enormity of the leachate problem in the northeastern part of the United States. Though new landfill developers in New Jersey are attempting to install liners and to treat the leachate collected, "little experience exists with regard to the various methods that might be successful in the handling of this complex fluid." *Id.* at 208. It is felt that state regulations are helpful but that true characteristics of leachate from the various types of landfills, the ability of soils to reduce the concentration of pollutants and the effects of cover materials at landfill sites is not sufficiently understood. The technology

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a byproduct of both aerobic and anaerobic decomposition[3] and that they are severely limited as to potential use

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". . . for eliminating the landfill as a continuing source of contamination (has) not been developed, and, because of this, there do not appear to be any clear-cut guidelines or policies that can be followed. The same holds true for how to contain or remove the pollutant after it has entered the ground." *Id.* at 218.

[3] All landfills (sanitary or otherwise) produce gases—initially carbon dioxide and later, as the oxygen level decreases, methane. "[T]he greater the quantity, putrescibility, moisture content and temperature of the refuse . . . the higher the rate of gas production within the landfill." *Measuring External Effects, supra* at 236. Additionally, these same variables make it difficult to predict the active lifespan of the deposited refuse. One study indicates that decomposition reactions may continue for up to 950 years.

> "The problems of fire and explosion hazards from landfills occur when methane gas . . . seeps into enclosed areas such as adjacent sewer lines or the foundations of buildings located above the fill. . . . Methane seepage from completed landfills is both inevitable and sufficiently abundant to produce a significant hazard." *Id.* at 238, 239.

Completed landfills are not easily converted into safe building sites although gas vents have been used with limited success for controlled escape and burning.

The authors discuss a study of gas seepage in a 29 building public housing project constructed on fill. Within 21 months after construction explosive mixtures of methane were found in crawl spaces below two of the buildings in the development. As attempts to seal the foundations proved unsuccessful it became necessary to install automatic ventilation equipment, especially since the methane accumulation had rapidly increased during the second and third years of monitoring.

when completed.[4] The standards originally set for the operation of sanitary landfills (daily compaction and soil cover) are understood today to be inadequate. Attempts to minimize the "leaching" of organic and inorganic pollutants from landfill sites through the use of liners are still in the experimental stage.[5] Many have been found faulty. Attempts have been made to vent accumulated gases but the danger of fire and explosion has not been eliminated.[6]

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[4] Fill materials slowly decompose causing a gradual shifting and settlement over the extent of a given site. Many factors are involved: the weight and composition of the fill, the weight of cover materials, the amount of rainfall and, if the land is used for construction the weight of the structure placed there. Since a number of these factors are unpredictable (the diverse nature of fill materials for example) "landfills are a particularly poor foundation material for construction". *Id.* at 259.

[5] Haxo, Henry E., Assessing Synthetic and Admixed Materials for Lining Landfills," *Gas and Leachate, supra,* 130. In *"Survival of Fecal Coliforms," supra,* the authors concluded that pathogenic microorganisms may be "transmitted into the environment through the leaching process" past an eighteen inch clay soil liner (considered reasonably "safe" by many experts in the field). *Id.* Even where leachate is collected for treatment, inert organic matter and totally dissolved inorganic solids cannot easily be removed. See Pohland, Frederick G., "Landfill Management with Leachate Recycle and Treatment: An Overview," *Gas and Leachate, supra.* 159.

[6] Flower, Franklin, "Case History of Landfill Gas Movement Through Soils," *Gas and Leachate, supra,* 177, and "Control of Gas Flow," *supra* at 555. "Case History" describes the death of peach trees in commercial orchards in Glouchester County, the death of ornamental vegetation and the entry of combustible gases into private homes in Camden County and the destruction of farm crops in Burlington County. The author comments, "Sometimes gas vents prevent the lateral migration (of possibly flammable gas) and sometimes they do not." *Id.* at 188.

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It may be, as the materials cited by the appellants suggest, that these health and environmental problems can be ameliorated if an ideal landfill site can be located and the operator, either voluntarily or as a result of strict governmental regulation, conducts his disposal business in accordance with the latest state of the art. However, nothing in the Commerce Clause requires the New Jersey Legislature to withhold taking immediate action to protect the State's health and environment in the hope that these ideal conditions someday may materialize. Conditions in the real world are rarely, if ever, ideal. Under the circumstances, there is no basis for questioning the findings of the New Jersey Legislature and Supreme Court of New Jersey that the disposal of solid waste in landfills represents a present threat to the health and environment of the inhabitants of New Jersey.

It also is fully consistent with the Commerce Clause to deal with this problem by taking reasonable steps to reduce the overall volume of waste being disposed on New Jersey land. Thus, in *Bradley* v. *Public Utility Com'rs*, 289 U.S. 92 (1933), the Court rejected a Commerce Clause challenge to the denial by the Ohio Public Utilities Commission of a certificate of convenience and necessity to operate an interstate bus route based upon the fact that the highway over which the service was to be conducted

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Also, in *Hazardous Waste Disposal Damage Reports* compiled by the U.S. Environmental Protection Agency's Office of Solid Waste Management Programs, *supra*, the agency describes three separate instances of waste disposal practices which resulted in arsenic poisoning, the destruction of farmland and, in New Jersey, the death of a bulldozer operator. The New Jersey incident occurred at the Kin-Buc Landfill adjacent to the Raritan River where chemical wastes of unkown industrial origin exploded.

was already overly congested. In a unanimous opinion written by Justice Brandeis, the Court said that "[s]afety may require that no additional vehicle be admitted to the highway" (289 U.S. at 96), even though the effect was to absolutely prevent the operation of the proposed new interstate bus route. If such a restriction may be imposed on a basic instrumentality of interstate commerce, it follows *a fortiori* that the transportation into a state of waste intended for dumping may be prohibited so as to reduce the overall magnitude of an established public health and environmental problem.

Therefore, in the words of the Supreme Court of New Jersey, the ban upon the disposal in New Jersey of out-of-state waste has a "relatively slight" "effect upon trade and commerce" whereas it is "crucial to the welfare" of the citizens of New Jersey. It follows that the ban is not offensive to the open national economy objectives of the Commerce Clause.

The appellants, in seeking to avoid the line of cases holding that the Commerce Clause does not prevent the states from enacting legislation to protect the health, safety and welfare of their citizens, rely on cases which have no bearing upon the restrictions which the Commerce Clause places on the states, in the absence of congressional action, but deal instead with the breadth of the power which the clause confers upon Congress. See *e.g. United States* v. *Pennsylvania Refuse Removal Association*, 242 F. Supp. 794 (E.D. Pa. 1965) aff'd 357 F. 2d 806 (3rd Cir. 1966) cert. den. 384 U.S. 961 (1966); *United States* v. *Bishop Processing Company*, 287 F. Supp. 624 (D. Md. 1968). Thus, the Court has held that Congress has the power under the Commerce Clause to enact legislation prohibiting the intersate transportation of prostitutes (*Hoke* v. *United States*, 227 U.S. 308 (1913) and

kidnapped person (*Gooch* v. *United States,* 297 U.S. 124 (1936). However, it would be ridiculous to suggest that the Commerce Clause may be invoked to prevent action by the states to combat these evils. Therefore, although *Biship Processing* recognized that the movement of air pollutants across state lines provides an adequate jurisdictional basis under the Commerce Clause for the enactment of the Clean Air Act (42 U.S.C.A. §1857, *et seq.*), this does not mean that the Commerce Clause would present an obstacle to the enactment of legislation by New Jersey to prevent all of Pennsylvania's air pollution from being collected and shipped to New Jersey for release on the property of a well-paid entrepreneur. Similarly, if the ships in *Huron Portland Cement* v. *City of Detroit,* 362 U.S. 440 (1960) were collecting all of the smoke which was produced while steaming the Great Lakes and were releasing it in Detroit Harbor, an ordinance prohibiting such a practice would not be struck down by the Court. The cases dealing with the reach of congressional power under the Commerce Clause are thus inappropriately relied upon by the appellants. *Cf. Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 57-58 (1911).

The appellants also rely on the "natural resource" cases to support their attack upon chapter 363. *Pennsylvania* v. *West Virginia* 262 U.S. 553 (1923); *West* v. *Kansas Nat. Gas Co.,* 221 U.S. 229 (1911). However, these cases all dealt with statutes which attempted, as described in *Pennsylvania* v. *West Virginia,* "to regulate the interstate business to the advantage of the local customers." 262 U.S. at 597-598. Furthermore, it is clear that natural resources such as oil and gas, are located in some states but not in others, and that restrictions upon interstate commerce in resources would have an adverse impact upon the national economy. See *Oklahoma* v. *Kansas Nat. Gas Co.,* 221 U.S. 229, 255 (1911). No comparable claim

can be made with respect to the disposal of waste. It is also clear that disposal of waste presents immediate problems with respect to health and environment which were not present in the "natural resource" cases. Therefore, these cases involve, under the analysis contained in *DuMond* v. *Hood, supra,* state regulation to ". . . constrict the flow of . . . commerce for [its] economic advantage . . .", not an attempt by the State ". . . to shelter its people from menaces to their health or safety. . . ." 336 U.S. at 533.

This case is similar in many respects to *Hughes* v. *Alexandria Scrap Corp.,* 44 Law Week 4959 (decided June 24, 1976). *Hughes* involved the environmental hazard of disposing of abandoned automobiles; this case deals with the environmental hazard of disposing of all forms of solid wastes. In *Hughes,* the State of Maryland pursued its environmental interests in part by a statutory system of bounties designed to encourage the recycling of abandoned automobiles. To prevent state funds from being dissipated by payments for automobiles abandoned in other states, it enacted amendments which had the practical effect of restricting the bounties to Maryland processors. This made it economically impractical for out-of-state processors to compete with Maryland processors in the purchase of abandoned automobiles from wreckers thereby substantially reducing this form of interstate commerce. The Court upheld this legislation essentially on the theory that the payment of bounties by the State to further its environmental interests was not the kind of action with which the Commerce Clause is concerned. Since New Jersey has pursued its environmental interests in limiting the ruin of its land by landfill operations by prohibiting the transportation into New Jersey for disposal of waste originating out of state, rather than expending state funds for this purpose, the subsidy ra-

tionale of *Hughes* is not directly applicable. However, the underlying purpose ". . . of protecting the state's environment" (*Id.* at 4963) is common to the two statutes, and there are a number of significant respects in which the New Jersey statute implicates the free market principles of the Commerce Clause to a lesser extent than did the Maryland statute. First, whereas the Maryland statute confers an economic advantage upon Maryland processors to the detriment of out-of-state processors, the New Jersey statute creates no economic preference for local economic interests. On the contrary, some of the appellants are New Jersey landfill operators who claim that they will lose business as a result of New Jersey's effort to protect its environment. Secondly, whereas the recycled scrap metal affected by the Maryland statute was indisputably an appropriate subject of interstate commerce, the New Jersey statutes does not affect any materials intended for re-cycling but rather is limited to the disposal of waste.[7] Finally, whereas it was cogently argued in *Hughes* that Maryland's environmental interests could be pursued equally effectively with less impact upon interstate commerce, there is no reasonable and economical alternative available to New Jersey to reduce the overall quantity of waste being dumped within its borders. Indeed, the appellants appear to concede as much by limiting their factual claims to the thesis that it is possible to operate landfills without significant environ-

[7] Appellants argue that chapter 363 on its face purports to be a prohibition on the entry of all solid and liquid wastes (except garbage for swine) for any purpose whatsoever. However, the Supreme Court of New Jersey recognized that the statute must be read with the regulations promulgated pursuant thereto prior to its effective date as only applicable to waste destined for disposal. The Court is bound by this interpretation of chapter 363 of the Supreme Court of New Jersey. *Smiley* v. *Kansas*, 196 U.S. 443, 455 (1904).

mental harm. Therefore, the exclusion of out-of-state waste transported for disposal within New Jersey is more clearly compatible with the free market objectives of the Commerce Clause than the program of economic subsidization for the recycling of abandoned automobiles upheld in *Hughes* v. *Alexandra Scrap Corp.*

It is also significant that Pennsylvania does not take the same cavalier attitude towards the health and environmental dangers of landfills manifested by Philadelphia's brief when the landfills are located on the Pennsylvania side of the border. On the contrary, Pennsylvania law leaves political subdivisions of that state free to exclude waste originating outside of their boundaries. As stated in the affidavit of the Commissioner of Streets of the City of Philadelphia:

> "13. Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively empowered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever." (App. 265)[8] (See also paragraphs 9 through 12 of Lind affidavit, dated December 8, 1975, at App. 293-296.)

The appellant Pennsylvania political subdivision is thus in the anomalous position of invoking the Commerce Clause as a sword to force New Jersey to accept its

[8] By contrast, New Jersey has comprehensive legislation regulating disposal of waste which prohibits one political subdivision from excluding solid waste originating in another political subdivision. N.J.S.A. 48:13A, *et seq.* (Solid Waste Utility Control Act, 1970); N.J.S.A. 13:1E-1, *et seq.* (Solid Waste Management Act of 1970); See *So. Ocean Landfill* v. *Mayor & Coun. Tp. of Ocean*, 64 N. J. 190, 314 A2d 65 (1974).

waste in an effort to solve disposal problems caused by the laws of its own state which allow the immediately surrounding Pennsylvania political subdivisions to exclude Philadelphia waste. This circumstance serves to underscore the fact that what is involved in this case is not preservation of an open national economy but an attempt by a political subdivision of one state to use the soil and environment of a sister state in the discharge of its obligation under the police power to provide for the disposal of the waste of its inhabitants.

Indeed, where efforts by one state, or its political subdivisions, to dispose of waste in a manner harmful to the inhabitants of another state have come before the Court, it has not been the disposing states which have sought to invoke the Commerce Clause as a license for the exportation of their waste problems, but rather the recipient states which have brought original actions, often successfully, against the disposing states to prevent actions harmful to their health and environment. See *e.g., Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972); *New Jersey* v. *New York City,* 283 U.S. 473 (1931); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri* v. *Illinois & Chicago District,* 180 U.S. 208 (1901). The Court in *Georgia* v. *Tennessee Copper Co., supra,* in granting an injunction to prevent a Tennessee company from discharging noxious gas from their factory into Georgia, appropriately noted that:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards should not be endangered from the same source." 206 U.S. at 238.

If conduct offensive to New Jersey took place solely in Pennsylvania as, hypothetically, by the appellants projecting their waste across the Delaware River into New Jersey, it would require such an action for New Jersey to protect the interests of its inhabitants. However, since the actual method of the disposal of Pennsylvania waste in New Jersey involves conduct within the jurisdiction of New Jersey, it was able to deal with the problem directly through prohibitory legislation. In any event, the point is that actions by one state which adversely affect the air, land and water of another state have never been conceived to be protected by the Commerce Clause.

In short, this case simply does not involve the national interest in the maintenance of an open economy which the Commerce Clause was designed to protect. Rather, it involves the fundamental responsibility of a state to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use. Therefore, the Court should affirm the conclusion of the Supreme Court of New Jersey that a state may prohibit the use of its land as a disposal site for waste generated within a political subdivision of another state.

POINT II

The record before the Supreme Court of New Jersey provided a reasonable basis for the legislative finding that the New Jersey environment is threatened by the disposal of waste originating out of state and thus there was no need for a plenary hearing before the trial court.

Appellants' final argument is that the Supreme Court of New Jersey somehow thwarted their efforts to develop a full record and thereby denied them due process of law. This contention is frivolous.

It was appellants' trial strategy which determined the course of proceedings in the state courts. Soon after the filing of their complaint, the appellants moved for summary judgment ". . . only upon the issues of federal preemption and discrimination against interstate commerce . . ." (App. 116-117) and the State cross-moved for summary judgment. Thus the essential thesis upon which the matter was submitted to the trial court was that, regardless of the impact upon public health and the environment, if New Jersey permitted the dumping in landfills of waste originating within the state, it was also obligated by the Commerce Clause to accept out-of-state garbage for dumping in its landfills. On the appeal by the State to the Supreme Court of New Jersey, appellants again essentially relied upon the thesis that chapter 363 violated the Commerce Clause by "discriminating" against waste originating out of state. No serious question was raised as to the validity of legislative findings that environmental degradation was being aggravated by the dumping in New Jersey of wastes originating out of state. Nor did the appellants pursue, as alternative grounds for affirmance, any of the other legal theories which had

been projected in shot gun form in their original complaint.[9] Rather, it was only after the Supreme Court of New Jersey had issued its opinion upholding the constitutionality of chapter 363 that the appellants, on a motion for remand to the trial court, first raised questions concerning the findings of the New Jersey Legislature and the Supreme Court of New Jersey as to the deleterious impact on the environment and public health of the dumping of out-of-state wastes in New Jersey (App. 259-287). The Supreme Court of New Jersey, over the strenuous objections of the State, granted this motion for remand to the trial court ". . . for such further proceedings, if any, that that court may deem appropriate . . ." (App. 340). Therefore, assuming that any facts remained to be heard, the appellants were given an opportunity to develop those facts. However, the appellants deliberately elected not to proceed before the trial court and instead to enter into a consent dismissal with prejudice.

There is, therefore, absolutely no factual basis for the appellants' contention that they were denied due process of law by the course of proceedings in the state courts. Rather, the appellants properly may be bound to the record as they elected to develop it in the state courts.

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[9] It is well established under New Jersey practice that a judgment may be supported on appeal not only on the grounds relied by the lower court but on any other grounds which will support the result. *Irving Isko* v. *Planning Bd. of Tp. of Livingston*, 51 N. J. 162, 175, 238 A2d 457, 464 (1968). It is also a fundamental policy of state judicial administration that all aspects of a controversy should be joined together in a single legal proceeding so as to avoid the delay and wastage incident to the fragmentation of litigation. *Falcone* v. *Middlesex County Med. Soc.*, 47 N. J. 92, 219 A2d 50 (1966). This means that where feasible a party who has prevailed in a lower court on one of several alternate theories should present any theory which may support the judgment to an appellate court.

As the court stated in *Reid* v. *Colorado,* 187 U.S 137, 152 (1902) in a related context:

> "The accused seems to have been content to rest his defense upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the state to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the state enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.
>
> "As therefore, the statute . . . only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the state under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish."

Appellants' explanation for their failure to pursue the remand to the trial court is to say that they needed an injunction against the effectiveness of chapter 363 and, since the Supreme Court of New Jersey had foreclosed the grant of that relief in the state system, it was not in their strategic best interests to continue with state

court proceedings. However, appellants' strategic situation did not differ from that of any other party who has been denied preliminary injunctive relief by a state court, since the right of appeal from the state courts to the Supreme Court of the United States is limited under 28 U.S.C. §1257(2) to final judgments. Therefore, if there were any substance to appellants' argument, 28 U.S.C. 1257(2), to the extent it permits appeals to the Supreme Court of the United States only from final judgments, would be subject to attack on due process grounds. The Court therefore should reject the appellants' attempt to characterize the end result of their own procedural maneuvering as a denial of due process by the Supreme Court of New Jersey.

Most importantly, even apart from the fact that it was appellants' trial strategy which determined the course of proceedings in the state courts, it is clear that the Supreme Court of New Jersey based its decision upon a fully adequate record. As discussed in Point I, the Supreme Court of New Jersey had before it the Basis and Background Statement of the New Jersey Department of Environmental Protection, the report of the State of New Jersey County and Municipal Government Commission entitled *Solid Waste: A Coordinated Approach* (1972), the affidavit of the Chief of the New Jersey Bureau of Solid Waste Management and of course the court's own findings in prior proceedings. These materials showed a reasonable basis for the legislative findings that the disposal of waste causes environmental and public health problems, that there is a shortage of landfill space in the state and that the disposal of waste originating out-of-state increases the overall volume of waste dumped within the state and thereby aggravates the state's solid waste disposal problems. The New Jersey Legislature's conclusions as to the dangers from solid waste disposal are

re-inforced by additional documentary materials of which the Court may take judicial notice. All of these sources provide a reasonable basis for sustaining the judgment of the New Jersey Legislature in banning the dumping within New Jersey of waste originating out of state. *Evco* v. *Jones, supra; Local Union No. 10* v. *Graham, supra; Welch* v. *Swasey, supra.*

The mere fact that an opinion may have been expressed by appellants that landfills can be operated without damage to public health and the environment does not give rise to a material contested issue of adjudicative fact requiring a trial. The judgment of the New Jersey Legislature is not subject to invalidation simply on the possibility that, after a contest between expert witnesses, a court may conclude that the experts attacking the legislative judgment have made the more persuasive case. As the Court stated in *South Carolina State Highway Dep't* v. *Barnwell Bros., supra,* at 191-192:

> "[C]ourts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce.
>
> • • •
>
> "Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. . . . Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis."

The same principles of judicial restraint were expressed in Justice Holmes' opinion in *Hebe Co.* v. *Shaw,* 248 U.S. 297, 303-304 (1918):

> "If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' *Price* v. *Illinois,* 238 U.S. 446, 452. . . . The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained, and that it is impossible for this court to say that they might not be believed to be necessary in order to accomplish the desired ends."

See also *Hughes* v. *Alexandria Scrap Corp., supra,* 44 Law Week at 4964. Similarly, since the record in the present case contains adequate support for the legislative findings that the exclusion from New Jersey of waste originating out of state reasonably would serve to protect the State's health and environment, there would be no basis for holding trial proceedings even if the appellants had not deliberately declined to avail themselves of this opportunity.

Finally, it should be noted that if any appellant landfill operator really were in a position to establish that it could

conduct a disposal operation for waste originating out of state without threat to the health, safety and welfare of New Jersey citizens, it could obtain a further exemption from the prohibitory impact of chapter 363. The statute confers broad power upon the Commissioner of Environmental Protection to permit waste originating out of state to be brought into the State where he determines that this can be done ". . . without endangering the public health, safety and welfare. . . ." If any party were able to show that any exemptions from the prohibition against dumping waste originating out of state could be adopted ". . . without endangering the public health, safety and welfare . . .", it must be presumed that the Commissioner would extend the scope of the existing exemptions. Moreover, under the broad principles of judicial reviewability of administrative actions which exist in New Jersey (see *In re Senior Appeals Examiners,* 60 N.J. 356, 290 A. 2d 129 (1972)) if the Commissioner in exercising his power under the law were "arbitrary, unreasonable and capricious," his actions could be set aside on appeal to the courts. However, in the procedural posture in which appellants have placed this matter before the Court, it must be assumed, as has been found by the New Jersey Legislature and the Supreme Court of New Jersey, ". . . that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

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OCTOBER TERM, 1975.

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC. AND DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

REPLY BRIEF OF APPELLANTS.

SUMMARY OF ARGUMENT.

P. L. 1973, *C.* 363 does not prohibit disposal of solid and liquid waste by land disposal alone, but prevents entry of all solid and liquid wastes for any purpose whatsoever. An unconstitutional statute cannot be saved by a regulation adopted under it. No basis exists to remove land disposal from the purview of the Commerce Clause. The New Jersey Supreme Court could not reasonably find that the entry of solid or liquid waste into New Jersey or its treatment, processing, storage or disposal therein, posed a material threat to the public health or environmental quality. Rational local planning for solid waste disposal can be accomplished without prohibition upon entry.

ARGUMENT.

The Arguments Presented by Appellees and by Vermont and New Hampshire as *Amici Curiae* Do Not Justify the Statutory Prohibition Against Entry Into New Jersey of Solid and Liquid Wastes Originating Out-of-State.

In their respective briefs, Appellees and the States of Vermont and New Hampshire as *amici curiae* treat *P. L.* 1973, *c.* 363 as if it prohibits the disposal of solid and liquid waste by landfill alone. So too, the New Jersey Supreme Court finds that the objective of the Statute is ". . . to prolong the useful lifespan of landfill areas within the State . . . ." (A248). That is manifestly not the case. *P. L.* 1973, *c.* 363 completely prohibits *every* form of storage, treatment, utilization processing and final disposal by a simple, but thoroughly effective expedient: it bans entry—

> *No person shall bring into this State* any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . . (Emphasis added.)

Neither the remaining regulative statutory language,[1] nor the "emergency" regulation promulgated pursuant

1. Entry is prohibited until the Commissioner of the Department of Environmental Protection ". . . has promulgated regulations *permitting and regulating* the treatment and disposal of such waste in this State". (Emphasis added.) It is curious that the sole "regulation" adopted by the Commissioner under this statute permits entry of certain specified wastes for designated purposes but entirely ignores the regulation of same. *N. J. A. C.* 7:1-4 (A92). It is also significant that *N. J. A. C.* 7:1-4 reaffirms the statutory ban upon *entry* of all solid and liquid wastes for any purpose.

thereto[2] (A92) is limited to land disposal, but relate, in general terms, to every form of treatment and disposal.[3]

The New Jersey Supreme Court conceded that the statute, on its face, prohibits the movement in interstate commerce of even those types of solid and liquid waste which it found to be merchantable (A240). It held, however, that the regulation issued in response to the legislation had a "confining effect" upon the unlimited exclusion mandated by the statute (A240):

> We, therefore, agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce is involved, as these regulations do really attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.
>
> *The amendments to the Waste Control Act,* N. J. S. A. 13:1I-9 and 13:1I-10, *totally banning the disposal of solid waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless,* as we have pointed out, *the DEP regulations,* issued in response to this legislation, do *except from the ban* on out-of-state refuse *those types of solid waste which may have a value for recycling or for use as fuel.* In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of 'merchantable' items or legitimate 'articles of trade', as those wastes which can be put to effective use are explicitly excepted from the ban (A239-240). (Emphasis added).

Although the New Jersey Supreme Court characterized *N. J. A. C.* 7:1-4 as having a "confining effect" upon *P. L.* 1973, *c.* 363, its decision did not, as Appellees suggest (Appellees brief, p. 32, n. 7), have the effect of construing the statute. There was no need for the Court to engage in the interpretative process since the statute was clear and unambiguous and not susceptible to different meanings. *N. J. A. C.* 7:1-4 represented no more than an implementation of the plainly expressed legislative intent: entry of specified solid and liquid wastes for limited purposes was permitted by the Commissioner of the Department of Environmental Protection consistent with the power grant to him by the statute.[4] An absolute, unlimited embargo remained upon entry of said wastes for every other purpose, and upon entry of other solid and liquid wastes for any purpose whatsoever.

A grant of regulatory authority empowers an administrative officer to carry into effect the will of the legislature as expressed in the statute. *Dixon v. United States,*

2. That regulation, which was adopted under *P. L.* 1973, *c.* 363 *two weeks prior to its effective date,* provides, in pertinent part, as follows:

> No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State.
>
> • • •

N. J. A. C. 7:1-4

3. The New Jersey Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.*, define "disposal" as "The storage, treatment, utilization, processing, or final disposition of solid waste." *N. J. A. C.* 7:26-1.4.20. A substantively identical definition is contained in the Solid Waste Management Act, *N. J. S. A.* 13:1E-3c.

4. As noted by the New Jersey Supreme Court, "The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, *through the promulgation of regulations by DEP, has in effects been amended* to exclude only that refuse which has no value either for fuel or recycling purposes." (A237, emphasis added).

318 *U. S.* 68, 74 (1965). But an unconstitutional statute does not confer regulatory power at all. Speaking for an unanimous Court in *Norton v. Shelby County,* 118 *U. S.* 425, 442 (1886), Mr. Justice Field observed:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

See also *Huntington v. Worthen,* 120 *U. S.* 97, 101-102 (1887); *Chicago, I & L. R. Co. v. Hackett,* 228 *U. S.* 559, 566 (1913). If an unconstitutional act "confers no rights" and "creates no office", then it certainly grants no power to an administrative officer to adopt a regulation which, by its confining effect, would constitutionalize an otherwise unconstitutional statute. The act must stand or fall on its own merits.

In addressing the question of evenhandedness, Vermont and New Hampshire candidly acknowledge ". . . that the New Jersey statute discriminates between New Jersey-source garbage and refuse and the out-of-state product" (*Amici* brief, p. 19). But they argue that a State, in its discretion, may take landfills out of commerce altogether in order to extend their life expectancy (*Amici* brief, pp. 4-5, 19) even though land sites themselves may be articles in commerce (*Amici* brief, p. 5). Understandably, no citational authority is offered to support this novel position, which was not argued below and is raised here for the very first time.

Amici contend that ". . . the threat to the life expectancy of sanitary landfills . . ." and not the intrinsic threat posed by garbage, is at issue in this case (*Amici* brief, pp. 4-5).[5] "The landfill potential of a state", they argue, "is

5. It already has been pointed out that *P. L.* 1973, *c.* 363 does not prohibit land disposal alone, but bans entry for any purpose.

a resource, just as water, oil, coal or any other commodity is a resource" (*Amici* brief, p. 5). But the Court should not apply Commerce Clause analysis to the area of solid waste disposal because ". . . the resource of open and available landfill space is so closely related to the provision of necessary government services that the Commerce Clause analysis is inapplicable" (*Amici* brief, p. 5).[6]

Oklahoma v. Kansas Nat. Gas Co., 221 *U. S.* 229 (1911) and *Penna. v. West Virginia,* 262 *U. S.* 553 (1923)[7] are dispositive of *Amici's* argument. In the latter case suits were brought by Pennsylvania and Ohio to enjoin West Virginia from enforcing a statute intended, through regulation of pipe line companies, to compel the retention within West Virginia of all natural gas there produced that might be required for local needs. West Virginia argued, in support of the legislation, that pipe line companies were engaged in a *quasi*-public business, and that the waning supply of natural gas was no longer sufficient to satisfy both local and extra-territorial needs. The legislation was characterized as a legitimate measure of conservation, and essential to provide heat to the residents of West Virginia during the winter months.

Notwithstanding these arguments, the statute was found to contravene the commerce clause: "If the situation

6. *Amici* view electricity, fuel, water, hospitals, schools and police facilities, together with solid waste disposal facilities, as ". . . a part of the amenities state or local governments provide directly or regulate closely" (*Amici* brief, p. 9). Electricity, *FPC v. Florida Power & Light Co.,* 404 *U. S.* 453, 458 (1972), fuel, *Penna. v. West Virginia,* 262 *U. S.* 553 (1923), water, *City of Altus v. Carr,* 255 *F. Supp.* 828 (W. D. Tex. 1966) aff'd *per curiam* 385 *U. S.* 35 (1966), and hospitals, *Hospital Building Co. v. Trustees of Rex Hospital,* — *U. S.* — (1976), may all be engaged in interstate commerce.

7. See also *City of Altus v. Carr,* 255 *F. Supp.* 828 (W. D. Tex. 1966), aff'd *per curiam* 385 *U. S.* 35 (1966). *Hudson County Water Co. v. McCarter,* 209 *U. S.* 349 (1908), upon which *Amici* rely, was for all practical purposes limited to its facts by this Court in *Oklahoma v. Kansas Nat. Gas Co.,* 221 *U. S., supra,* at 258-260.

be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere". *Penna. v. West Virginia*, 262 *U. S. supra*, at 598.

Although a governmental unit may establish reasonable land use and resource conservation regulations, it may not limit the application of same to a designated class of persons. If, for example, a privately owned power company was operated on privately owned property zoned for such use, a state could not decree that the facility terminate its service to out-of-state customers. The state could not impose such a ban even if there was not enough electricity available to handle the demands of its own residents.

Amici attempt to avoid this conclusion by arguing that ". . . New Jersey is no more obligated to provide landfill space to serve the needs of local Pennsylvania governments and their citizens than it is to provide places for Pennsylvania pupils in their schools or police protection to Pennsylvania towns" (*Amici* brief, pp. 9-10). The problem with this reasoning is that New Jersey is not providing landfill space: the land is owned by private enterprise engaged in a legitimate, highly regulated business. If the State chooses to condemn and pay for sanitary landfill property in order to enter the market itself, and then restrict its trade to its own citizens or businesses within the State, a different question might be presented, *Hughes v. Alexandria Scrap Corp.*, — *U. S.* — (1976). But that is not the question presented here.

In *Hughes*, decided subsequent to the submission of Appellant's brief, this Court reaffirmed the fundamental principle that a State may not interfere ". . . with the natural functioning of the interstate market either through prohibition or through burdensome regulation", *Hughes v. Alexandria Scrap Corp.*, — *U. S.*, *supra*, slip sheet opinion at 11). If the statute considered in *Hughes* had prohibited

the flow of automobile hulks into Maryland for processing or disposal, or regulated the condition under which it may occur (slip sheet opinion, p. 11) then the statute presumably would have fallen. Yet that is precisely the effect of *P. L.* 1973, *c.* 363 in the instant case: it prohibits the entry into New Jersey of automobile hulks for any purpose whatsoever.[8]

Just as the "raw material" of the scrap metal processor includes automobile hulks, an incineration plant, a liquid waste processing facility, a composting plant, and a sanitary landfill require a sufficient volume of solid and liquid waste to maintain their economic feasibility (A93, 271, 281-282); see also *P. L.* 1975, *c.* 326, § 3 amending *N. J. S. A.* 13:1E-2c. This fact was graphically, but incongruously, admitted by Appellees who argued that the State may prohibit the transportation of articles which are inherently dangerous to public health (Appellees brief, pp. 17-18), while they simultaneously permitted the entry, without further regulation, of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid waste to protect the economic survival of treatment and processing facilities (A93). Certain types of refuse which may be unmerchantable for other purposes represent an article of commerce in the waste collection, treatment, processing or disposal context. The established course of interstate business attests to that fact.

A State has the unquestionable power to protect the health and safety of its people. *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951). It may pass reasonable regulations to accomplish that end. But it may not prohibit the interstate transportation and disposal of solid and liquid

8. Auto bodies are specifically included within the definition "bulky waste" in the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1.4.3. Neither *P. L.* 1973, *c.* 363 nor the "emergency" regulation adopted pursuant thereto, would permit the entry of same. See also *N. J. A. C.* 7:26-1.4.20 which includes "processing" within the definition of disposal.

waste when such drastic measures are concededly unnecessary to protect public health and environmental quality (Appellants brief, p. 47; A109). The local interest has all the protection that it needs without imposing undue discriminatory burdens on interstate commerce. As averred by the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency:

> . . . It is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations and recognized engineering practices. (A59)

Appellees seek to support the judgment of the New Jersey Supreme Court by maintaining that its findings ". . . are solidly grounded on the Basis and Background Statement of the New Jersey Department of Environmental Protection, quoted in the Counterstatement of the Case, and the report of the State of New Jersey County and Municipal Government Commission, entitled *Solid Waste: A Coordinated Approach* (1972), of which judicial notice was taken by the Supreme Court of New Jersey (App. 233)." (Appellees' brief, p. 23).

The problem with this analysis is that the Basis and Background Statement referred to by Appellees and incorporated in their brief (Appellees' brief, pp. 4-10) [9] was based upon information and belief (A72) and not upon personal knowledge as required by the Rules Governing

9. The entire "Basis and Background Statement" is reprinted at A73 *et seq.*

the Courts of the State of New Jersey, R. 1:6-6. In addition, Appellants challenged the validity of certain critical conclusions reached in the report entitled *Solid Waste: A Coordinated Approach* (A274). Despite more than ample time to respond, this challenge has never been refuted by Appellees.

Even if the Basis and Background Statement is properly relied upon, it does not support the conclusion reached by the New Jersey Supreme Court. The Statement was intended to provide the rationale for the proposed Rules of the Bureau of Solid Waste Management. Upon the adoption of said Rules on June 28, 1974 (A128), the Commissioner of the Department of Environmental Protection commented that they afforded ". . . far greater protection to the lands and waters of . . . [the] State [of New Jersey]" [10] (A127), than did the State Sanitary Code which, according to the *New Jersey Solid Waste Management Plan* published by the Department (A74), already assured ". . . nuisance-free operation of disposal sites in conformance with good practice and health standards" (Appellants' brief, p. 52). If this were not enough, the Principal Environmental Engineer of the Bureau of Solid Waste Management admitted that the Bureau's proposed Rules were ". . . adequate to protect the public health, safety and welfare or the quality of the environment" (A109).

Problems commonly associated with land disposal were identified by the Basis and Background Statement

10. Particular attention was directed to problems associated with gas generation and ground water contamination. See Appellants brief, pp. 54-56. The Department of Environmental Protection acknowledged that information supplied under the Rules should be sufficient ". . . to assess the potential of a proposed sanitary landfill to pollute the ground or surface waters" (A80). Gas control measures and venting were also required as a condition of operation (A81-82).

and systematically controlled by the Rules in order to protect the public health and environmental quality. This is consistent with the legislative direction to the Department of Environmental Protection to ". . . formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State" *N. J. S. A.* 13:1D-9.

Although the question was not raised below and should not be considered by the Court, Vermont and New Hampshire infer that use of disposal facilities in New Jersey for solid waste collected outside the State would somehow defeat rational local planning (*Amici* brief, pp. 11, 17). Nothing could be further from the truth. *N. J. A. C.* 7:26-2.5.25 and *N. J. A. C.* 7:26-2.5.26 require the maintenance of records revealing the quantity of solid waste accepted for disposal. By monitoring quantity, the life expectancy of disposal facilities may easily be computed and future alternatives planned well in advance of anticipated need.

It is not responsive to assert that "more rapid filling of landfills than planned may mean short-run profits for the operators and long-term costs for the communities that prematurely will require alternative sites for solid waste disposal or will have to curtail or alter planning for growth" (*Amici* brief, p. 11). Commercial enterprises engage in business to make a profit.[11] That is the basis of the American economic system. If local government desires to achieve greater control over cost, then it should itself purchase a disposal facility and limit the usage thereof to its own constituents, if it can do so without violating state or federal law. It is one thing to say that a state may regulate price, and quite another to maintain that it may control

11. This profit margin is controlled by the New Jersey Department of Public Utilities, *N. J. S. A.* 48:13A-1 *et seq.*

prices *and* customers. Such regulation goes far beyond a legitimate local purpose.

CONCLUSION.

Based upon the aforesaid argument, and the arguments set forth in the Brief of Appellants heretofore filed with this Court, it is respectfully urged, in order of preference, and in the alternative, (1) that the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional on the ground that same directly burdens and discriminates against interstate commerce; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

We hereby certify that on this 26th day of October, 1976, three copies of the Reply Brief of Appellants were mailed, with adequate first class postage prepaid: to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to William C. Brashares and Paul M. Laurenza, Cladouhos & Brashares, attorneys for *amicus curiae*, National Solid Wastes Management Association, at their law office located at 1750 New York Avenue, N.W., Washington, D. C. 20006; to Louis L. Meier Jr., attorney for *amicus curiae*, American Society of Civil Engineers, at his law office located at 1625 Eye Street, N.W., Washington, D. C. 20006; to David H. Souter, Attorney General, attorney for the State of New Hampshire, *amicus curiae*, at his office located in the State House Annex, Concord, New Hampshire 03301; and to M. Jerome Diamond, Attorney General, attorney for the State of Vermont, *amicus curiae*, at his office located in the Pavilion Office Building, Montpelier, Vermont, 05602.

We further certify that all parties required to be served have been served.

By _____
HERBERT F. MOORE

By _____
ARTHUR MEISEL

MOTION FILED

MAY 28 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, ET AL.

v.

NEW JERSEY, ET AL.

On Appeal from the Supreme Court of the State of New Jersey

MOTION AND BRIEF FOR AMICUS CURIAE, AMERICAN SOCIETY OF CIVIL ENGINEERS

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On Appeal from the Supreme Court of the State of New Jersey.

MOTION OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Society of Civil Engineers (hereinafter "ASCE") respectfully moves, pursuant to Rule 42.3 of this Court, for leave to file the accompanying Brief as Amicus Curiae on the merits of this case. Although the attorneys for Petitioners have consented to the amicus filing of a brief amicus curiae, the amicus has been advised that the Respondent will not grant its consent.

The American Society of Civil Engineers (ASCE) is a non-profit corporation registered in the State of New York. Its membership consists of more than 72,000 individual civil engineers and other qualified individuals. The objective of the Society, as stated in its Constitution, is the advancement of the science and profession of engineering to enhance the welfare of mankind.

An important concern of the Society is to promote sound engineering thought and practice in the solution of problems of environmental sanitation including the proper disposal of or recycling of solid wastes, the control of pollution, and the social and environmental impact of solutions to these engineering problems.

ASCE has a responsibility to represent its members in important public policy matters significantly affecting the foregoing interests. The question before this court, that of the constitutionality of excluding out-of-state solid waste from deposit within landfills of New Jersey, is of particular concern to ASCE. This is because the Society believes that the Court's decision may have an impact on environmental and pollution issues beyond this particular case and, more significantly, may affect others than the parties to the case. Accordingly, the ASCE focus of interest is upon these aspects of the questions involved.

It should be noted, also, that the ASCE perspective on the issues is different from that of the parties to the case. The viewpoint is that of the practicing civil engineer. The engineer believes that the complex ecosystem which provides mans' life sustaining environment, and the pollution problems associated therewith, know no political boundaries. These problems, therefore, are ill suited for unilateral solutions. In the words of Justice Cardoza, "the peoples of the several states must sink or swim together."

The Society believes that the import ban imposed by the New Jersey Waste Control Act is unsound from an engineering and professional point of view, and, moreover, is unconstitutional.

The situation, unfortunately, is not helped by the provisions of the Pennsylvania Solid Waste Management Act regarding the review authority of counties over the solid waste management plans of municipalities within the state. The primary emphasis in the Pennsylvania law is on a state-wide plan. The law, further, contains retaliatory authority directed at the states which do not accept solid waste from Pennsylvania. (This latter proviso was enacted in 1974 in response to the New Jersey Act.) Further, the fact that the population density of New Jersey is 953.1 persons per square mile compared to 262.3 per square mile in Pennsylvania (381.3 persons per square mile in New York) does not make it easy to deal with the people aspect of the problem. (1970 census data, 1973 World Almanac, 144) But the foregoing has no bearing on the constitutionality of the New Jersey statute, even though it does have much to do with New Jersey's understandable concern in seeking to preserve its scarce landfill areas.

What is important, however, is that the concept of areawide solutions to environmental problems has been embraced by the federal government in the air pollution/water pollution control programs and in the solid waste management field. In the long run, this public policy should work to provide optimum solutions for the good of all states and all citizens.

It is axiomatic that environmentally sound solutions to the solid waste management problem must be based on engineering considerations and their assessment by skilled professionals. The problem is sufficiently complex from the engineering standpoint alone, without the imposition of artificial, environmentally unsound political constraints. The nation cannot afford this kind of parochialism with its resulting inefficiency. It would reverse the progress made so far in the management of solid wastes and could have far reaching implications, as well, in matters relating to energy issues.

While the immediate problem is Philadelphia's, and Pennsylvania's, the precedent established would spread rapidly across the country. Regional solid waste management systems are already operating and many more are in various stages of planning and development throughout the nation. These regional systems and plans, in being and projected, are environmentally sound and cost-effective. Such regional solutions would be jeopardized or rendered useless if the New Jersey precedent is allowed to become widespread. Already six other states—Maine, Massachusetts, New Hampshire, Pennsylvania, Rhode Island and Vermont prohibit, to varying degrees, the disposal of out-of-state solid waste. Delaware, Illinois and Louisiana allow disposal of solid waste from out-of-state, but with certain limitations. It would appear that a Federal policy of primary state responsibility over the environment, coupled with provisions for areawide planning to make such responsibility meaningful in each state, is in jeopardy.

Because of the importance of the issues involved, ASCE desires to present to this Court, for its assist-

ance, the Society's views in regard to the significant questions involved in this proceeding.

WHEREFORE, the American Society of Civil Engineers respectfully requests this Court to grant this motion and permit the Society to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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May 28, 1976

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On Appeal from the Supreme Court of the State of New Jersey

BRIEF FOR AMICUS CURIAE, AMERICAN SOCIETY OF CIVIL ENGINEERS

PRELIMINARY STATEMENT

The American Society of Civil Engineers (hereinafter "ASCE") respectfully requests this Court to permit the filing of the Brief Amicus Curiae attached hereto and submitted herewith.

STATEMENT OF THE CASE

New Jersey's Waste Control Act prohibits the disposal within the state of solid waste originating or collected outside the state's territorial borders without a like prohibition against New Jersey solid waste. Two state trial courts have held the prohibition unconstitu-

tional, in violation of the Commerce Clause, Article I, paragraph 8, clause 3, of the United States Constitution, in that it is an unreasonable discrimination against interstate commerce to the extent it would prohibit deposit in sanitary landfills within New Jersey of wastes originating outside of the state, but permit such deposit for wastes originating within the state. The New Jersey Supreme Court held that the Act does not violate the Commerce Clause and that the ban is a reasonable means to accomplish a legitimate goal of preserving New Jersey land. The Court further held that there has been no discrimination, at least in the economic sense. The City of Philadelphia seeks review of this final judgment, dealing solely with the federal constitutional question. Justice Brennan has ordered the judgment of the Supreme Court of New Jersey stayed, pending the timely filing of a notice of appeal, the timely docketing of the appeal, and action by the Supreme Court on the jurisdictional statement. It is to be noted that, by letter dated December 22, 1975 to Associate Justice William J. Brennan, Jr. the American Society of Civil Engineers supported the issuance of this stay. In April the Supreme Court noted jurisdiction.

INTEREST OF AMICUS CURIAE

As set forth in the motion for leave to file this brief, and as restated herein, the American Society of Civil Engineers and its members have a significant concern for insuring that the Commerce Clause guarantee against unreasonable discrimination against interstate commerce shall be upheld and that expressed federal policy encouraging cooperative solutions, to environmental problems, at the state and local level by states' exercise of authority shall not be frustrated.

The American Society of Civil Engineers (ASCE) is a non-profit corporation registered in the State of New York. Its membership consists of more than 72,000 individual civil engineers and other qualified individuals. The objective of the Society, as stated in its Constitution, is the advancement of the science and profession of engineering to enhance the welfare of mankind.

An important concern of the Society is to promote sound engineering thought and practice in the solution of problems of environmental sanitation, including the proper disposal or recycling of solid wastes, the control of pollution, and the social and environmental impact of solutions to these engineering problems.

ASCE has a responsibility to represent its members in important public policy matters significantly affecting the foregoing interests. The question before this Court of the constitutionality of excluding out-of-state solid waste from deposit within landfills in New Jersey is of particular concern to ASCE because the Society believes that the Court's decision may have an impact on environmental and pollution issues beyond this particular case, may affect others than the parties to the case, and may have implications with reference to energy issues as well. The ASCE focus of interest is upon these aspects of the questions involved.

It should be noted, also, that the perspective on the issues is different from that of the parties to the case. The viewpoint is that of the practicing civil engineer. It is the engineering view that mans' life-sustaining environment, and pollution problems associated therewith, know no political boundaries. These problems, therefore, are ill adapted to unilateral solutions. In

the words of Justice Cardoza, "the peoples of the several states must sink or swim together."

Hence, the decision in this case will affect the values ASCE seeks to promote on behalf of its membership. Accordingly, the Society desires to present to this Court, for its assistance, ASCE views as to the issues involved in this proceeding.

SUMMARY OF THE ARGUMENT

I. It is well established that solid waste is a legitimate subject of trade or commerce and is, therefore, within the purview of the Commerce Clause. Solid waste management is an essential element in the production of goods that flow in interstate commerce. Interstate commerce includes more than transportation, it embraces all the component parts of commercial intercourse among states. Solid waste management is a field of engineering. Further, engineering is a profession, which in the broadest sense is a driving force of seminal character which forges that very foundation from which our commercial trade emanates.

II. State laws based on the exercise of the police power, whether for the purpose of conserving natural resources or of protecting the environment, may not stand if they unreasonably discriminate against interstate commerce. In this case, the New Jersey Waste Control Act is unconstitutional as representing such discrimination, to the extent that it would prohibit disposal of solid waste within New Jersey of solid waste originating outside of the state but permit such disposal of wastes originating within New Jersey.

III. Federal policy favors the states' exercise of their own authority over the environment, with provi-

sions for interstate cooperation. In this case, a state statute would operate to interfere with the possibility of cooperative efforts of other states who support a minimal Federal role. The effect would be, in the long term, to thwart the Federal policy of placing primary reliance on the states. Further the precedent set could have implications as to energy issues. Invalidation of the New Jersey legislation is required because the state's action is inconsistent with public policy as established by the Congress and is destructive of the interests of other states who abide by national public policy. These states recognize that the solid waste problem is a national environmental problem, having broad implications and that the possibility of interstate and regional solutions to the component parts of the problem should not be precluded.

ARGUMENT

I. The Commerce Clause[2] Issue: The management of solid waste is interstate commerce within the meaning of the Commerce Clause.

It is well established that solid waste is a legitimate subject of interstate commerce.

In *Hackensack Meadow. D. Commission* v. *Municipal San. L.A.*, 316 A.2d 711, 716, the trial judge noted that:

Waste "may be utilized for construction, landfill, recycling of paper, bottles and metals and production of electricity." Further, in *United States* v. *Pennsylvania Refuse Removal Association,* 242 F. Suppl. 794, 799 (E.D.Pa. 1965), 357 F.2d 806, 809 (3rd Cir.), cert. denied, 384 U.S. 961, aff'd, 16 L.Ed.2d 674 (1966),

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[2] U.S. Constitution, Article I, Sec. 8, Cl. 3 "The Congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

the service of transporting and disposing of solid waste was held to constitute interstate commerce. See also *United States* v. *Bishop Processing Co.*, 287 F.Suppl. 624, 631, 632 (D.C. Md. 1968). In addition, solid waste disposal has been held to be an essential part of the production of goods for commerce. See *Brennan* v. *Metropolitan Trash, Inc.*, 513 F.2d 1324, 1327 (1975), and cases cited therein.

The Supreme Court has pointed out that "interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among states." *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1, 10 (1928). In this case, the Court held that a state statute that operates directly to burden any of the essential elements of interstate commerce is invalid.

In *United States* v. *Pennsylvania Refuse Removal Association,* 242 F.Suppl. 794, 799 (1965), the Court emphasized that the real subject of "trade or commerce" was not the worthless garbage that was being transported but, rather, the valuable services.

In a functional sense, as a field of civil engineering, solid waste management must also be considered as interstate commerce. In this regard, the Court in *United States* v. *National Society of Professional Engineers,* 389 F. Suppl. 1193, 1199 (1974), characterized engineering as "an industry often organized on a local, regional, national or even international scale, controlling, guiding and shaping the pace and direction of the vast array of interstate transactions needed to carry out much of the nation's construction and manufacture. The record is impressive in demonstrating that the imprint of professional engineering upon interstate commerce is clear and unmistakable. It is a driving force of seminal character which continues to forge the very foundation from which our commercial trade emanates."

II. The New Jersey Waste Control Act would effect an improper discrimination against interstate commerce and is hence unconstitutional.

—Discrimination Issue

"The power of the national government over commerce with foreign nations and among the several states is broad and comprehensive. It reaches the interior of every State of the Union, so far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin." *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1879). In *Baldwin* v. *G.A.F. Seilig,* 294 U.S. 511, 522, the Court says, "It is the established doctrine of this court that a state may not in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co.* v. *Pigg,* 217 U.S. 91, 112. The Court goes on to say, "It (the Constitution) was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division."

In *Hackensack Meadow. D. Com'n* v. *Municipal San. L.A.,* 316 A.2d 711, 719 the Court points to *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229, 255 (1910), 31 S.Ct. 564, 571, 55 L.Ed. 716, 726 (1911), where "Oklahoma enacted a law which prevented a pipeline company from transporting natural gas outside the state." The purpose of the law was to conserve natural gas in the Oklahoma fields for consumption in the

state. In declaring the statute violative of the Commerce Clause, the U.S. Supreme Court commented,

> "... The Statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one State has it, all States have it; embargo may be retailiated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are not state lines.' In such commerce, instead of the States, a new power appears and a new welfare—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court." (31 S.Ct. 564, 571)

Importantly, implicit in *Guy* v. *Baltimore* and *West* v. *Kansas Natural Gas Co.* is the fact that the origin of the subject of interstate commerce is pertinent to the question of conformance with the Commerce Clause, not the residence of the owner or carrier.

The New Jersey Supreme Court therefore erred in holding that there has been no discrimination, at least in the economic sense, stating, "Nor is there any real or significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state." (*Hackensack Meadowlands Commission* v. *Municipal Authority,* 8 ERG 1447, 1456)

As cited in *Hackensack Meadow. D. Com'n.* v. *Municipal San.LA.,* 316 A.2d 711, 718, 719, "In *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 598 43 S.Ct. 658, 665, 67 L.Ed. 1117, 1133 (1923), a West Virginia statute restricted the exportation of natural gas to ensure a sufficient supply for its own citizens. Although the Supreme Court recognized that 'the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of people of the state,' the statute had to fall because it interfered with interstate commerce."

"Because the national 'common market' which is intended by the Commerce Clause, does not absolutely prohibit state legislation in the area of commerce, a state may regulate in a constitutionally accepted manner. A state may not, however, give preferential treatment to in-state sources at the expense of out-of-

state sources." *American Can Co.* v. *Oregon Liquor Control Commission*, No. 75567 (Cir. Ct. Ore. Sept. 1, 1972) 2 ELR 20642, 20644.

Since importation of out-of-state solid waste is flatly prohibited in New Jersey, amicus believes that the New Jersey Supreme Court erred in holding the New Jersey statute non-discriminatory.

—Balancing Test

The New Jersey Supreme Court applied a balancing test to judge whether the burden imposed on interstate commerce by the state statute exceeds or outweighs the benefit accruing to the state. In *Pike* v. *Bruce Church Inc.*, 397 U.S. 137, 142 (1970), the Court had this to say with reference to such a test.

> "Although the criteria for determining the validity of State statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 443, (1959). If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Of course the New Jersey statute patently discriminates against out-of-state solid waste and accordingly, based upon the guidelines outlined in the foregoing paragraph relating to evenhanded regulations, amicus

believes the balancing test to be an improper one to use in this case.

By way of further discussion of this point, it should be noted that the Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid and, indeed, primary objective of the police power. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1959). Accordingly, it would seem that there is no question that extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is likewise a legitimate and valid exercise of the police power of the State subject to the general rule stated in *Huron Portland Cement Co.* v. *Detroit.*

With appropriate evenhandedly applied standards for treatment and disposal of solid waste, New Jersey landfills could last much longer. Congress, in effect, has recognized the importance of evenhandedness by providing that the EPA administrator shall encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal. (42 U.S.C. Sec. 3254) The Court has addressed this issue saying "... a state may not impose a burden which materially affects interstate commerce in any area where uniformity of regulation is necessary." (*Huron Portland Cement Co.* v. *City of Detroit* et al., 362 U.S. 440, 443 (1959)). In any case, with reference to the question of landfill life, one estimate is that a statewide probitition on solid waste originating elsewhere would only lengthen the statewide landfill life by approximately 8%. (*Hackensack Meadowlands Commission* v. *Municipal Authority,* 8 ERG 1447, 1450). Rather than imposing a ban on solid waste originating from out of state, New Jersey should focus

more sharply on the problem of the entire intra-state and inter-state solid waste load on the Jersey landfill sites and the implications thereof. It appears to be a more critical situation for the state of New Jersey than for its neighbors because of the much higher population density of New Jersey as compared with the states of Pennsylvania and New York. By looking at the solid waste problem in its totality New Jersey could improve on its own situation substantially, in an evenhanded, non-discriminatory manner as to any burden on interstate commerce. At the same time the door would be kept open to cooperative areawide solutions, as encouraged in the Federal Solid Waste Disposal Act of 1965 (42 U.S.C. Sec. 3254). Barring this approach the states in the region might soon reach the position where there would be no feasible alternative except a Congressionally legislated Federal solution. Development of orderly interstate urban solid waste management programs should be fostered, rather than narrow, parochial attitudes. A state of relatively high population density (New Jersey) and a state of low density (Pennsylvania or New York) should have equal potential in the long term for the solution of solid waste problems in an efficient and effective way. This means that possibilities for regional and interstate solutions should not be ruled out.

So, even should the balancing test be deemed appropriate, any benefits which might accrue to new Jersey would be short term at best and more illusory than real. On the other side of the scale, the precedent effect on interstate commerce, as related to the entire environmental area as well as to energy matters, could be quite profound. The scales accordingly would not seem to tip in favor of upholding the New Jersey legislation.

III. The Federal Preemptive Issue: [3]

It is well established that a state may, in the exercise of its police power, enact legislation, even though it may effect interstate commerce, provided that the Federal Government has not preempted the field. *Cooley* v. *Board of Wardens* (53 U.S. (12 How.) 299, 319 (1851)).

Preemption occurs when a state statute obstructs the "accomplishments and execution of the full purposes and objectives of an Act of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Congressional design to occupy the field is not necessarily required. Preemption also occurs in the case of an actual conflict between federal and state statutes where both cannot stand and state regulation need be nullified. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963).

Expressed Federal Policy favors "the state's exercise of its own authority over the environment." (*American Can Company* v. *Oregon Liquor Control Commission*, 2 ELR 20642, 20645) This Federal Policy can be detected in the Environmental Quality Improvement Act of 1970 (42 U.S.C. Sec. 4371), the Federal Water Pollution Control Act (33 U.S.C. Sec. 1151(b) (1970) and in the Federal solid Waste Disposal Act of 1965 (42 U.S.C. Sec. 3251 (1970). The policy, however, cannot be construed to mean uni-

[3] U.S. Constitution Article VI, Clause 2 "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

lateral state action by each state, in isolation from neighboring states, as can be seen from a further reading of the statutes.

More specifically the legislative history of the Solid Waste Disposal Act of 1965, P.L. 89-272 states that "Federal financial assistance is needed to encourage and help States and interstate agencies to undertake surveys of solid waste disposal practices and to develop solid waste disposal plans on a statewide or interstate basis. It is evident that statutory provisions establishing a national program to meet and accomplish these objectives for improved solid waste handling must include the following basic elements: . . . provision must be made for interstate and interlocal cooperation in the establishment and conduct of solid waste disposal programs." (1965 U.S. Code Cong. and Adm. News p. 3608, 3615).

The Solid Waste Disposal Act of 1965 recognized the problem of solid waste management as a national problem and extended the federal reach into an area of formerly exclusively local control. (42 U.S.C. Sec. 3251-59 1970). The Act prescribes that "while the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies, the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership . . . to provide for proper and economical solid-waste disposal practices." (42 U.S.C. 3251) . . . "In addition, the Administrator shall encourage cooperative activities by the States and local governments in connection with solid-waste disposal programs; (and) encourage, where practicable,

interstate, interlocal and regional solid waste disposal programs. (42 U.S.C. 3254).

Likewise, in closely related legislation, the Federal Water Pollution Control Act 33 U.S.C. 1154, it is stated "that the Administrator shall encourage cooperative activities by the States for the prevention and control of water pollution; encourage the enactment of improved and, so far as practicable, uniform State laws relating to the prevention and control of water pollution; and encourage compacts between States for the prevention and control of water pollution." (33 U.S.C. 1154).

Further the Environmental Quality Improvement Act of 1970 states: "(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law." (42 U.S.C. 4371(b)).

As a practical matter cooperation is particularly needed in the field of solid waste management during a period when federal limits on air and water pollution serve to add to the waste burden of land. At this time, for example, Philadephia is being turned away from disposal of solid waste at sea, disposal upon naturally

toxic soil formations in Pennsylvania because of obdurate local opposition and Pennsylvania law, and incineration because of cost and air pollution laws. Federal Water Pollution Control Act as amended in 1972 (33 U.S.C.A. Secs. 1314-15, 1317, Suppl.); 1973 Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C.A. Sec. 1411 Suppl.); Clean Air Act (42 U.S.C.A. Sec. 1857 c-4, (1970), and Pennsylvania Solid Waste Management Act 1968 July 31 P.L. 788, No. 241, as amended by Commonwealth of Pennsylvania Act 337 of 1974, 35 Purdons Statutes 6001 et seq.

The cooperative approach appears to be in line with the Court's own view, "that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." (*Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, v. *Ware*, 414 U.S. 117, 127 (1973). On this basis the New Jersey Act is hardly consistent with either Federal policy or that of this Court, in its flat prohibition against the importation of solid waste and its insensitivity to the interrelationship between statutes adopted by the separate, yet coordinate, Federal and state sovereignties.

In connection with the foregoing problems relating to traditional approaches to solid waste disposal it should be noted that the prospects for long-run progress for recycling and recovery are promising in view of the basic economic pressures associated with the costs of virgin materials, energy and land. Further improved recovery technology will continue to provide an attractive alternative to traditional disposal methods. (The Sixth Annual Report of the Council

on Environment Quality, December 1975, U.S. Government Printing Office p. 94) In *Hackensack Meadow. D. Commission* v. *Municipal San. L.A.*, 316 A.2d 711, 716, the court observes that "refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity. In passing, it might be noted that *some successful* incineration systems which create waste heat for power generation exist in Germany, the Netherlands, France and Switzerland."

Congress has declared that "it is the continuing policy of the Federal Government, in cooperation with State and local governments, . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans . . . (I)t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—. . .

—obtain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,

—enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." (42 U.S.C. 4331)

Application of the doctrine of preemption in this case would work to make possible the promoting of cooperation as between states and the federal government

and the doctrine, it is suggested, should play an important role in shaping the decision of this Court.

CONCLUSION

For the foregoing reasons, this Court should rule that the import ban imposed by the New Jersey Waste Control Act is unconstitutional.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW JERSEY

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

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BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Are solid and liquid waste and the services related to disposal of such wastes legitimate subjects of interstate commerce?

2. Does a state statute that prohibits the entry into the state of solid or liquid waste (except garbage to be fed to swine in the state) collected outside the state, discriminate against or place an undue burden on interstate commerce?

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

In its Motion for Leave to File Brief as Amicus Curiae in the instant case, the National Solid Wastes Management Association set forth its interest in participating in this proceeding. By order dated April 5, 1976, this Court granted the aforesaid motion.

ARGUMENT

I.

SOLID AND LIQUID WASTE AND THE SERVICES RELATED TO THE DISPOSAL OF SUCH WASTES ARE LEGITIMATE SUBJECTS OF INTERSTATE COMMERCE.

Appellees have argued below and to this Court that the collection, treatment and disposition of solid and liquid wastes do not fall within the scope of the commerce clause of the Constitution, Article 1, Section 8. See Appellees' Motion to Dismiss and Brief in Support Thereof at 8-11. The thrust of appellees' argument in this regard appears to be that waste products are not legitimate subjects of interstate commerce because they are nonmerchantable and allegedly injurious to the public health.

It surely cannot be plausibly asserted that waste materials are without actual or potential value. It is universally recognized that waste products are an increasingly important source of resource recovery and energy generation,[1] and that the disposition of waste materials is a significant aspect of land reclamation programs.[2] Moreover, the increased attention directed at enhancing the range of valuable end uses of waste materials, coupled with the development of increasingly sophisticated technologies, indicate that the spectrum of possible uses of waste materials will continue to be substantially broadened in the future.

Moreover, apart from the importance of waste materials for the purposes discussed above, the distinction suggested by the appellees and the New Jersey Supreme Court below, 68 N.J. at 468, between valuable and "valueless" waste materials fails to recognize that the value or merchantability of waste materials often depends to a significant extent on the marketplace rather than on any intrinsic qualities of the "waste" materials in question. In recent years the demand for many "waste" materials, and thus a chief determinant of the value of such materials, has fluctuated considerably, depending on external economic factors including the supply and demand behavior of other industries. Thus, any attempt to categorize waste materials as "valueless" or "nonmer-

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[1]See, e.g., *Solid Waste Management Forecasts—A Projection of Trends Likely to Occur: Storage, Collection, Processing, Recovery, and Disposal,* National Solid Wastes Management Association Technical Bulletin (March/April 1976); *Resource Recovery From Solid Wastes—A Progress Report,* National Solid Wastes Management Association Technical Bulletin (June 1976).

[2]See, e.g., *Sanitary Landfills: Potential Land Uses for the Future,* National Solid Wastes Management Association Technical Bulletin (January 1976).

chantable" misunderstands and misconstrues an essential economic characteristic of the waste management industry. Therefore, to adopt such a distinction for purposes of commerce clause analysis in cases involving the waste management industry would be to adopt an artificial, inaccurate and obviously unmanageable criterion.

In a context closely analogous to the present case, the federal district court for the district of Maryland recently held that the movement of automobile hulks across state lines constituted interstate commerce. *Alexandria Scrap Corp. v. Hughes,* 391 F. Supp. 46, 59 (D. Md. 1975). (It is particularly significant that automobile hulks are expressly included within the definition of "bulky waste" in the rules of New Jersey's Bureau of Solid Waste Management. N.J.A.C. 7:26-1.4.3.) In that case the court examined whether a Maryland statutory scheme designed to rid the state of abandoned vehicles through the use of bounties and assessments violated the commerce clause of the federal constitution. The comprehensive scheme of bounties and assessments was found by the court to burden unduly the free flow of interstate commerce by imposing certain disadvantages on out-of-state scrap processors, such as the plaintiff, relative to processors with in-state physical plants.

In making the initial determination that the movement of automobile hulks across state lines constituted interstate commerce, the court made clear that its finding was premised on the fact that "the movement of vehicles across state lines involving plaintiff is substantial." *Id.* at 59 n.28. Judged by the substantiality of interstate business in the items involved, therefore, it can hardly be doubted that the movement of waste products across state lines, which constitutes a substantial portion of the refuse removal industry's business activity, clearly constitutes interstate commerce.

Even aside from the acknowledged merchantable qualities of waste in the present day that obviously bring it within the constitutional sense of commerce, the contention that the movement of wastes does not fall within the ambit of the commerce clause also ignores the crucial point that the service of collecting, transporting and disposing of such waste materials constitutes interstate commerce. This principle was clearly established in *United States v. Pennsylvania Refuse Removal Association,* 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd.*, 357 F.2d 806 (3d Cir. 1966), *cert. denied,* 384 U.S. 961, wherein the district court stated:

> Here, the real subject of "trade or commerce" was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the word "trade or commerce" as used in the [Sherman] Act, United States v. National Association of Real Estate Boards, 339 U.S. 485, 488-492, 70 S.Ct. 711, 94 L.Ed. 1007 (1950), the defendants' position has no merit.

242 F. Supp. at 799. This holding was expressly affirmed by the court of appeals for the Third Circuit, which declared, ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." 357 F.2d at 808.

The decisions of the district and circuit courts in *Pennsylvania Refuse Removal, supra,* recognized a fundamental fact that appellees have attempted to obscure by characterizing the instant case as indistinguishable from those Supreme Court decisions holding that nonmerchantable items are not within the protection of the commerce clause, see, e.g., *Clason v. Indiana,* 306 U.S. 439 (1939) (animal carcasses); *Asbell v. Kansas,* 209 U.S.

251 (1908) (unhealthy swine or cattle); *Crossman v. Lurman*, 192 U.S. 189 (1904) (noxious or decayed foods); *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (immature citrus fruit). As the trial court in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N.J. Super. 160, 169-170, 316 A.2d 711 (Ch. 1974), correctly recognized, this line of cases

> classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as nonmerchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease.

However, in examining whether the service of collecting, transporting and disposing of waste materials constitutes interstate commerce, the contention that some waste materials may not in and of themselves be "merchantable"—an argument that at best is seriously misleading and inaccurate for reasons discussed previously—only begs the question at issue, since the business of refuse removal and disposition of such materials as may be nonmerchantable is a direct function of their nonmerchantability. Because the refuse removal industry deals partly in nonmerchantable materials, appellees would exclude this industry, or at least a substantial part thereof, from the scope of commerce clause protection, despite the fact that the very function of this industry, a substantial portion of whose activity is interstate, and the reason for its existence and its strictly regulated character, is to provide the public with the essential *service* of removing and disposing of nonmerchantable material which otherwise could pose health problems. The obvious fallacy of appellees' position was recognized by the district court in *Pennsylvania Refuse Removal, supra,*

when the court declared that focusing on the nonmerchantability of some waste materials "misse[d] the point" since the essential subject of trade or commerce was the service of removing and disposing of such materials. 242 F. Supp. at 799.

In asserting that the movement of waste materials across state lines does not constitute interstate commerce, appellees contend that *Pennsylvania Refuse Removal* is inapposite since this case dealt with delineations of the scope of interstate commerce in the context of the enforcement of a federal statute (the Sherman Act) rather than in the context of commerce clause limitations on a state's police power. Two points warrant mention in response to this contention.

First, the case of *Alexandria Scrap Corp. v. Hughes*, discussed *supra*, which held that the movement of automobile hulks across state lines constituted interstate commerce, did not deal with the enforcement of a federal statute, but rather dealt with precisely the same issue as is presented by the instant case, i.e., the scope of the commerce clause of the federal constitution as a limitation on a state's police power.

Furthermore, while this Court, in cases involving the imposition of incidental burdens on interstate commerce, has recognized a state's power to effectuate legitimate local interests, this recognition does not properly go to the jurisdictional question of whether interstate commerce is involved but rather concerns the issue of accommodating federal and state interests. Thus, the appellees' attempt to dismiss the threshold "in commerce" determination of the court in *Pennsylvania Refuse Removal, supra,* involves considerations not properly at issue in ascertaining whether a particular activity constitutes interstate commerce within the meaning of the commerce clause.

In sum, then, appellees' arguments below and to this Court, and the decision of the New Jersey Supreme Court below, fail to recognize existing precedent holding that the movement of waste materials across state lines falls within the scope of the commerce clause, and ignore the substantial and essential interstate character of the refuse removal industry.

II.

PUBLIC LAW 1973, CHAPTER 363, DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF ARTICLE 1, SECTION 8 OF THE UNITED STATES CONSTITUTION.

In *Great Atlantic & Pacific Tea Co. v. Cottrell,* 96 S.Ct. 923, 928 (1976), this Court reiterated the prevailing test for determining the validity of state statutes affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit,* 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (footnote omitted).

It is clear that, under the standard articulated in *Huron Cement Co. v. Detroit, supra,* and reaffirmed in *Pike v. Bruce Church, Inc., supra,* and *Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* the statute in the instant case is not an evenhanded regulation, but rather prohibits the disposal of waste material solely on the basis of the origin of such material. In this manner the statute, in purpose and effect, discriminates only against wastes collected outside New Jersey. Such a statute is distinguishable, therefore, from statutes or regulations involved in cases in which a state or locality attempted to regulate nondiscriminatorily particular activities which had some effect on interstate commerce. See, e.g., *Head v. New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963); *Huron Cement Co. v. Detroit, supra.*

A particularly pertinent example of such a nondiscriminatory regulation case is *Huron Cement Co. v. Detroit, supra,* which was relied upon by the New Jersey Supreme Court below in asserting that "the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this [the state's police] power." 68 N.J. at 473. In *Huron,* the regulation in question restricted the amount and density of pollution emitted by vessels docked in the city of Detroit. In upholding the ordinance against the challenge of discrimination against interstate commerce, the Court declared:

> State regulation, based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. State of Georgia, 163 U.S. 299, 16 S.Ct. 1086, 41 L.Ed. 166; Lake Shore & Michigan Southern Railway Co. v. State of Ohio, 173 U.S. 285, 19 S.Ct. 465, 43 L.Ed. 702; Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752;

Bob-Lo Excursion Co. v. People of State of Michigan, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455.

> It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designated to better the health and welfare of the community. . . . We conclude that no impermissible burden on commerce has been shown.

362 U.S. at 448 (emphasis added). Thus, the ordinance in *Huron* did not involve any discrimination against interstate commerce and therefore presented an entirely different situation from the New Jersey statute, which, while purportedly aimed at environmental problems, discriminates solely against interstate commerce while neglecting entirely any environmental considerations arising from the collection and disposition of wastes within New Jersey.

The principle enunciated in *Huron* that a state regulation based on the police power must be nondiscriminatory has been followed by this Court and by the lower federal courts in numerous instances. In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), the Court upheld a New Mexico statute which prohibited certain forms of advertising. Although the Court found that the trial court's injunction against the appellants "unquestionably imposed some restraint upon that [interstate] commerce," *id.* at 427-28, the Court upheld the statute as a measure directly addressed to protection of the public health. In reaching its conclusion the Court, citing *Huron*, noted that, "It has not been suggested that the statute, applicable alike to 'any person' within the State of New Mexico, discriminates against interstate commerce as such." 374 U.S. at 429. Similarly,

in *Canton Poultry, Inc. v. Conner*, 278 F. Supp. 822 (N.D. Fla. 1968), the court upheld a Florida poultry law providing for inspection, grading and tagging of poultry products sold within the state. In so holding, the court stated:

> State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852. The state act is applied to locally produced poultry offered for sale in Florida as well as poultry shipped into the State. Any burden which might result from compliance with the state law rests equally upon the local distributors, and is therefore nondiscriminatory.

278 F. Supp. at 825. See also *Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976) ("since the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity, appellees' claim that the [regulation] unreasonably burdens commerce must fail." (footnote omitted).

The New Jersey Supreme Court, in citing judicial decisions supporting a state's power to enact health and environmental legislation, cited cases within the category of nondiscriminatory regulation. 68 N.J. at 476, *citing Huron Cement Co. v. City of Detroit, supra; Construction Industry Association v. City of Petaluma, supra; Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *American Can Co. v. Oregon Liquor Control Commission*, 15 Ore. App. 618, 517 P.2d 691 (1973); *Portland Pipe Line Corp. v.*

Environmental Improvement Commission, 307 A.2d 1 (Me. 1973), *appeal dismissed*, 414 U.S. 1035 (1973). In all of the above-cited cases, therefore, including *Huron*, there is no question raised as to discrimination exclusively against interstate commerce. The instant case, however, puts in issue precisely such a discriminatory regulation aimed solely at the interstate transportation and disposition of waste materials. Thus, the instant case directly parallels those cases wherein a state, for whatever ostensible reason, attempts to curtail the flow of commerce across state lines. See, e.g., *Great Atlantic & Pacific Tea Co. v. Cottrell, supra; Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

In an attempt to justify the wholly discriminatory nature of P.L. 1973, c. 363, the appellees and the New Jersey Supreme Court have attempted to categorize as impermissible only such discriminatory statutes as manifest a blatant attempt by the enacting state to erect barriers to competition for the economic and commercial advantages of the regulating state. Illustrative of this attempt at facile categorization is the cursory treatment by the New Jersey Supreme Court of the "natural gas" cases, *West v. Kansas Natural Gas Co., supra*, and *Pennsylvania v. West Virginia, supra*. In rejecting the rationale of the state's trial courts, the New Jersey state supreme court declared:

> In those cases the state effort was to preserve an exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic.

68 N.J. at 447. The appellees' and the New Jersey Supreme Court's characterization of the aforementioned two cases clearly does not, however, fully address the facts and the Supreme Court's reasoning in these cases, particularly as articulated in *Pennsylvania v. West Virginia, supra*. In that case the Court's recognition of the relationship of the flow of natural gas to the public health and welfare was clearly expressed. In acknowledging the state's interest in such commerce apart from that of the individuals affected, the Court stated:

> The private consumers in each state not only include most of the inhabitants of many urban communities but constitute a substantial portion of the state's population. *Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream.*

Id. at 663 (emphasis added).

Similarly, the Court recognized the appellants' contention that the statute was a vehicle to conserve an essential and dwindling natural resource. Specifically, the appellants' argument was that:

> [T]he gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the Act is therefore a legitimate measure of conservation in the interests of the people of the state.

Id. at 665. The Court's response to this argument was unequivocal:

> *If the situation be as stated*, it affords no ground for the assumption by the state of power to regulate interstate commerce, which is what the Act attempts to do.

Id. (emphasis added). Thus, contrary to appellees' and the New Jersey Supreme Court's characterization of the "natural gas" cases, these cases indicate that this Court recognized the possible conservation values and objectives underlying the statutes in question and nonetheless invalidated the statutes as impermissibly interfering with interstate commerce. These cases, therefore, do not, as appellees seem to suggest, present the same considerations as are present in cases wherein the statutes involved had no valid conservation or health purposes, but rather sought only to protect local merchants from out-of-state competition. Consequently, the arguments of the appellees and the decision of the New Jersey Supreme Court fail to distinguish adequately the "natural gas" cases from the instant case. To the contrary, these cases, as the Supreme Court recognized, did not involve attempts to frustrate interstate competition solely for selfish economic reasons, but rather involved statutes designed to preserve a state's dwindling natural resources by restricting the use by other states of the enacting state's natural resources. This is precisely the type of action which New Jersey has attempted by shutting out from landfill sites in New Jersey wastes collected in other states.

Moreover, it is of no consequence that the "natural gas" cases prohibited exports while the New Jersey statute in question bans imports, for as the Court in *Pennsylvania v. West Virginia, supra,* recognized:

> A state law, whether of the state where the gas is produced or *that where it is to be sold,* which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference.

262 U.S. at 665 (emphasis added). It is apparent from the quoted language that the Court was focusing on the

interruption of the flow of interstate commerce and not on whether such interruption resulted from the producing or recipient state. Similarly, the New Jersey statute, a statute of the state into which the flow of commerce is directed, produces the same discriminatory interruption of interstate commerce as was condemned in the "natural gas" cases discussed above.

In seeking to rationalize the discriminatory character of P.L. 1973, c. 363, appellees have asserted that the statute seeks to protect the public health, safety and welfare by eliminating or ameliorating purported health dangers associated with the disposal of waste materials. Appellees' Motion to Dismiss and Brief In Support Thereof at 11. The assertion of such a position before this Court is somewhat curious in view of the fact that the state courts below recognized that P.L. 1973, c. 363, was not aimed at purported health problems. As the trial court in *Hackensack Meadowlands,* 127 N.J. Super. at 170, stated:

> It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal. . . .

To the same effect the trial judge in *City of Philadelphia v. New Jersey*[3] stated:

> [T]he purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste that is presented to the various disposal companies, the natural

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[3]The opinion, which is not reported, is included in Appellants' Jurisdictional Statement as Appendix A-1.

> resources, the land, [and] the availability of the land will be prolonged or extended or used less quickly.

And the New Jersey Supreme Court observed:

> There is every indication that this [preventing acceleration of depletion of existing landfills] was the true reason for the enactment of the amendments to the Waste Control Act (P.L. 1973, c. 363).

68 N.J. at 465 n.10.

The appellees have never established that the importation of out-of-state wastes endangers the health or safety of New Jersey's residents. Rather, in attempting to circumvent the fact that there is no qualitative difference between in-state and out-of-state wastes, the appellees have simply asserted, on the basis of incomplete and inadequate documentation, that the alleged health problems associated with sanitary landfills are necessarily aggravated by the increase in waste disposal resulting from the importation of out-of-state wastes.[4] Moreover, the appellees' allegation entirely ignores the fact that there exists strict regulation and inspection of land disposal facilities under state standards to insure the protection of public health. The rules of New Jersey's Bureau of Solid Waste Management are comprehensive in this regard. See N.J.A.C. 7:26-1 *et seq.* See also Pub. L. 92-500, 33 U.S.C.A. §1151 (Supp. 1975) (Federal Water Pollution Control Act); Pub. L. 93-523, 42 U.S.C.A. 300f (Supp. 1975) (Federal Safe Drinking Water Act). Thus,

[4]It is anomalous that the only exception to non-importation recognized in P.L. 1973, c. 363, is "garbage to be fed to swine in the State of New Jersey". Garbage, as defined in New Jersey, means putrescible wastes. N.J.A.C. 12:100-2.1. Such wastes are recognized as creating a greater health threat than nonputrescible wastes. The anomaly is compounded by the fact that hazardous and chemical wastes, which clearly may present health hazards far more serious than other forms of waste, are permitted into New Jersey by regulation of the Department of Environmental Protection. N.J.A.C. 7:1-4.2.

the appellees' assertions as to the relationship between the importation of out-of-state wastes and dangers to the health of New Jersey residents are simply not adequately supported in the evidence, and appellees have never attempted to refute the arguments made and the affidavits presented to the New Jersey Supreme Court demonstrating that the existing rules of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management,[5] are totally adequate to protect the health, safety and welfare of New Jersey residents and the quality of New Jersey's environment.

What remains, therefore, of the asserted legitimacy of the local purposes ostensibly served by P.L. 1973, c. 363, is the contention that the statute will conserve or extend the life of existing landfills in the state. Apart from the fact that the New Jersey Supreme Court's reliance on various studies undertaken at different times creates a confused and sometimes apparently contradictory assessment of the life expectancy of existing landfills in New Jersey, the extension of existing landfill life expectancy by the statute at most will be insubstantial. As the New Jersey Supreme Court recognized, the ban on importation of out-of-state wastes at best is a stop-gap measure which can, if effective, delay only minimally the predicted exhaustion of existing disposal sites.[6] Thus, the question is presented as to whether the imposition of a measure directly discriminating against interstate commerce can be justified when it only serves a local purpose

[5]See Appellants' Jurisdictional Statement Appendix O.

[6]The New Jersey Supreme Court stated, "It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%. . . ." 68 N.J. at 461. The court did not indicate specifically by whom such an estimate was made.

which admittedly is insubstantial in consequence. The New Jersey Supreme Court's treatment of this question was cursory at best:

> Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. *Less than total exclusion of solid waste generated outside New Jersey would have been of no avail.*

68 N.J. at 475 (emphasis added).

Although this Court has properly been more suspect of discriminatory legislation intended to erect economic barriers against competition from out-of-state sources, the decisions of the Court have made it clear that even where legitimate areas of local concern are involved, the burden to be tolerated by the statute or regulation at issue will depend on the particular local interest and on whether such interest could be furthered by less burdensome or restrictive alternatives. *Great Atlantic & Pacific Tea Co., supra; Pike v. Bruce Church, Inc., supra.* With respect to the question of less burdensome alternatives, this Court has recently declared:

> Inquiry whether adequate and less burdensome alternatives exist is of course important in discharge of the Court's task of "accommodation" of conflicting local and national interests, since any "realistic judgment" whether a given state action "unreasonably" trespasses upon national interests must of course consider the "consequences to the State if its action were disallowed."

Great Atlantic & Pacific Tea Co., supra, at 929. In this case the Court examined Mississippi's argument that the state's mandatory reciprocity regulation on milk produced in other states enabled Mississippi "to assure itself that the reciprocating State's (here Louisiana's)

health standards were the 'substantial equivalent' of Mississippi's." *Id.* at 930. The Court, rejecting the argument, stated that even if Mississippi's assertion were true, "there are means adequate to serve this interest that are substantially less burdensome on commerce. . . ." *Id.*

In *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951), the Court considered a Madison, Wisconsin ordinance prohibiting the sale of milk in the city unless such milk had been processed at an approved pasteurization plant within five miles of the city. While the Court recognized that sanitary considerations pertaining to milk that originated in non-local areas could justify "regulat[ion] in the interest of the safety, health and well-being of local communities," *id.* at 353, the Court declared that such regulation could not stand "even in the exercise of [the city's] unquestioned power to protect the health and safety of its people, if *reasonable nondiscriminatory* alternatives, adequate to conserve legitimate local interests, are available." *Id.* at 354 (emphasis added). The Court struck down the Madison ordinance on the grounds that such reasonable nondiscriminatory alternatives, adequate to serve local interests, existed.

In the instant case, the state of New Jersey has portrayed the present waste disposal situation in the state as a crisis situation. And the state has argued that the enactment of a non-importation statute was necessary to cope with this crisis because federal and regional solutions to the problem of waste disposal have not been forthcoming. Yet the state has failed to consider and evaluate alternatives within its reach that could alleviate the alleged problem without a blanket prohibition on the importation of wastes into New Jersey.

The state's Department of Environmental Protection ("DEP"), according to the sworn testimony of its

principal environmental engineer, has not undertaken any studies to calculate the total acreage available for sanitary landfill purposes in the state of New Jersey. Thus, this critical question of the availability of suitable acreage within the state for landfill purposes was completely ignored by the New Jersey Supreme Court, and apparently has not been studied by the state agencies directly responsible for such matters. Rather, the appellees and the New Jersey Supreme Court have dwelt only on the contention that existing landfill sites will be more quickly exhausted if the importation of out-of-state wastes is allowed to continue. Even with respect to existing sites, however, the DEP's principal environmental engineer has testified that the life expectancy of existing landfills could be increased by utilizing various processing alternatives to reduce the weight and/or volume of solid waste materials. *Cf. Shredding of Municipal Solid Waste and Emerging Technology,* National Solid Wastes Management Association Technical Bulletin (Dec. 1974). It was further stated in such testimony that the DEP, however, had not undertaken any studies to estimate the extent to which such processing alternatives could extend the life of existing landfills.

In addition, the Supreme Court of New Jersey did not discuss the availability of landfill sites outside New Jersey as a disposal alternative for wastes generated within New Jersey. Such an omission appears particularly curious in light of the practice of some New Jersey communities of disposing of wastes outside New Jersey. According to testimony of DEP's principal environmental engineer, no effort was ever made by DEP to consider the possibility of using out-of-state facilities for disposal of New Jersey wastes. This failure appears especially incongruous in light of the New Jersey Supreme Court's intimation that

extraterritorial solutions to New Jersey's "crisis" were unavailable. 68 N.J. at 462-63. Ironically, the enactment of a non-importation ban threatens to completely eliminate the possibility of New Jersey residents using out-of-state disposal sites to the extent that the New Jersey statute invite sister states to retaliate by passing similar discriminatory legislation, as Pennsylvania has already done.

None of the possibilities outlined above apparently has been fully evaluated by the state of New Jersey as an alternative to a ban on importation of out-of-state wastes. Rather, the state has assumed or at least asserted the existence of a "crisis" situation and has acted precipitously without considering possible solutions other than the most drastic "solution"—blocking the free flow of interstate commerce in the transportation of waste materials into the state. Yet, in reality, the state of New Jersey's enactment of such a ban in effect dramatizes the state's reluctance to evaluate potentially available alternative approaches. In this respect, then, New Jersey's enactment of P.L. 1973, c. 363, does not reflect the unavailability of reasonable solutions to a purported solid waste "crisis", but rather illustrates the state's apparent unwillingness to explore even the most basic possible solutions, such as studying the available acreage statewide for sanitary land disposal facilities, to the solid waste problem purportedly confronting the state.

Appellees and the New Jersey Supreme Court have asserted that the impact of P.L. 1973, c. 363, on interstate commerce is only incidental. 68 N.J. at 475-76. At the outset it should be recognized that a statute the purpose and effect of which is to ban interstate commerce cannot plausibly be characterized as only incidentally affecting such commerce since, as this Court has

stated, ". . . to prohibit interstate commerce is more than to indirectly affect it." *West v. Kansas Natural Gas Co., supra* at 249.

Congress has clearly recognized the interstate character and importance of solid waste disposal. Both in the Solid Waste Disposal Act, P.L. 89-272, 42 U.S.C. §3251 (1970) and the Resource Recovery Act of 1970, P.L. 91-512, Congress directed the relevant federal agencies to encourage cooperative state and regional efforts in dealing with solid waste disposal, as well as to promote the achievement of reasonably uniform state and local laws pertaining to such disposal. 42 U.S.C. §3254. Thus, while the regulatory sphere was left largely to the states, Congress expressly attempted to promote approaches to solid waste disposal that transcend local jurisdictional boundaries.

P.L. 1973, c. 363, repudiates these congressional directives in the most severe manner possible, i.e., by shutting New Jersey off from the interstate transportation of waste materials. The most immediate effect of such a non-importation ban is that New York and Pennsylvania residents who have used New Jersey sites will now be prevented from utilizing such sites. Apart from the costs involved in such a redistribution of removal patterns, P.L. 1973, c. 363, if permitted by this Court to stand, threatens to create a multiplicity of non-importation statutes as the various states retaliate against one another. This effect is already evidenced by the fact that Pennsylvania, New Jersey's sister state, has enacted a non-importation ban subsequent to the enactment of and in retaliation against P.L. 1973, c. 363. See Pennsylvania Solid Waste Management Act, P.L. 788, *as amended*, 1974 P.A. 337.

This Court has repeatedly emphasized its function to assess the practical impact of a statute which affects interstate commerce. In this regard, the Court has acknowledged the importance of a statute's possible effect on interstate commerce through potential similar action of other states. In *Pennsylvania v. West Virginia*, 262 U.S. *supra*, at 596, the Court declared:

> [I]n the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the Constitution. The question is an important one; for what one may do, others may, and there are 10 states from which natural gas is exported for consumption in other states.

And the Court most recently restated this concern in *Great Atlantic & Pacific Tea Co. v. Cottrell*:

> To allow Mississippi to insist that a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk, supra*, 340 U.S., at 356, 71 S.Ct., at 299. No "parochial legislative polic[y]," *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S., at 538, 69 S.Ct., at 665, could be more precisely calculated to open the "door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S., at 522, 55 S.Ct., at 500.

96 S.Ct. at 932.

At least six states have passed legislation which limits in varying degrees the importation of waste materials.

And it appears that a number of other states are seriously considering enactment of non-importation legislation and are thus awaiting the decision of this Court in the instant case. There can be little doubt, therefore, that should P.L. 1973, c. 363, be permitted to stand, other states will surely follow in passing similar legislation.

The effect of such legislation would be precisely the same effect as this Court has decried in numerous past decisions. See, e.g., *Best & Co., Inc. v. Maxwell,* 311 U.S. 454 (1940); *Baldwin v. G.A.F. Seelig, supra; Pennsylvania v. West Virginia, supra.* Because the statute in the instant case reveals no clear economic motive on its face, the appellees contend that it in no way raises the threat of "economic balkanization" which was one of the chief reasons for enactment of the commerce clause. This contention, however, ignores what is certain to be the cumulative effect of non-importation statutes on interstate commerce.

For example, some New Jersey communities currently dispose of wastes in adjacent areas of neighboring states. Should New Jersey residents be denied access to these disposal sites, just as residents of these states have been denied access to sites in New Jersey, the effect of this denial of access would be to confine the waste disposal business within each state's own boundaries. Thus, "The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry," *Toomer v. Witsell,* 334 U.S. 385, 404 (1948), and, when viewed in conjunction with similar prohibitions enacted by other adjacent states, such as that imposed by Pennsylvania, the effect is in essence to "requir[e] business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local

interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.,* 397 U.S., *supra,* at 146.

In sum, if the statute in the instant case is allowed to stand, the impact will not only thwart the declared congressional objective of promoting national and regional solutions to waste disposal problems, but will also force a significant interstate industry into an inefficient and economically damaging restructuring of its traditional business patterns.

CONCLUSION

Public Law 1973, chapter 363, was enacted solely to bar the flow of commerce in waste material, much of which is valuable and merchantable, and all of which is the subject of a substantial interstate commerce activity. This radical approach was chosen without any meaningful consideration of alternatives that would not restrain commerce. And the use of such an approach will have minimal effect in solving the alleged problem that inspired it. This is not a case of balancing serious environmental and conservational motives against an incidental burden on commerce. This is a flat prohibition on commerce meant to spare the state the burden of pursuing meaningful environmental or conservational approaches to waste management. It is an action by

New Jersey in defiance of federal policy and almost certain to breed similar actions in retaliation by other states. This is a classic case of discrimination against interstate commerce which cannot pass muster under the Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this 3rd day of June, 1976, three copies of this Brief For National Solid Wastes Management Association as Amicus Curiae were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By_____
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By_____
Paul M. Laurenza

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),

APPELLANTS,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF THE STATES OF VERMONT AND NEW HAMPSHIRE AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),
APPELLANTS,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF THE STATES OF VERMONT AND NEW HAMPSHIRE AS AMICI CURIAE

Interest of Amici Curiae

The amici are states with statutes that are similar in effect to the New Jersey statute here in issue.[1] This brief

[1] 24 V.S.A. §2204, §2205; NH RSA 147:30-e *et seq.* (Supp.).

seeks not simply to add weight to the position of the State of New Jersey but to support the outcome in the New Jersey Supreme Court not only on the basis of that Court's Commerce Clause analysis but also because the position taken by the Appellants would erode traditional and essential elements of State sovereignty, would diminish the motivation to solve essentially bistate or multistate problems by compact or regional agreements, and would tend to set populated and rural regions against each other when their interests should be cooperative and reciprocal.

Questions Presented

(1) Is planning for adequate solid waste disposal facilities an essential state governmental function (like planning for schools, roads, sewage treatment and police protection)?

(2) May a State, as a quasi-sovereign, limit the use of available sanitary landfill space to garbage collected within the State?

(3) Must available sanitary landfill space be deemed a commodity in commerce (like natural gas, milk, meat, fish or farm products)?

Summary of Argument

Properly analyzed, the commodity involved in the transportation of garbage and refuse located in one state into another for disposal is the available site rather than the garbage itself.

States possess the power to control solid waste disposal under their police powers, and regulation or maintenance of such facilities by municipalities is almost universal. Sanitary landfills are essential to modern community life and are so closely related to government functions and

purposes as to preclude their consideration as articles in commerce. States may conserve available landfill space for in-state garbage, just as any fundamental state services may be limited to the service of in-state residents and towns.

Even under Commerce Clause analysis, the New Jersey statute does not discriminate in favor of local interests.

The Appellants' arguments would discourage, not promote, cooperative interstate solutions to pressing solid waste disposal problems.

Argument

I. Garbage Shipped for Disposal Is Not Itself an Article in Commerce, for the Value in the Transaction Inheres Solely in (A) the Service of Removal and Transport and (B) the Available Disposal Site.

The answer to the constitutional questions here posed will depend on the proper analysis of the underlying transactions. The New Jersey Supreme Court concluded alternatively that either garbage should not be afforded the protection of the Commerce Clause because of its lack of value and danger to health[2] or, even if the service of transporting and disposing of solid waste constitutes interstate commerce, where the "negative implications"[3] of the Commerce Clause are concerned, the interests of interstate commerce are to be weighed against the "legitimate and valid exercise of the police power of the State."[4] The Court concluded:

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[2] *Hackensack Meadowlands Development Commission* v. *Municipal Sanitary Landfill Authority*, 68 N.J. 451, 348 A.2d 505, 512-513 (1975).

[3] 348 A.2d at 514.

[4] 348 A.2d at 516.

> "The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 442, 80 S. Ct. 813, 4 L.Ed.2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological value are, without more, sufficient to warrant an exercise of this power." 348 A.2d at 516.

In *Huron Portland Cement Co., supra,* Detroit's smoke abatement code applied to ships based in any state, and in fact the defendant there was a Michigan citizen. The classical balancing analysis begins with the assumption that the state law asserting police power over an interstate commercial function or activity applies equally to in-state functions or activities. *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949).

Why then may the "legitimate and valid exercise of the police power"[5] asserted by New Jersey here differentiate out-of-state refuse from the domestic product?

Except where garbage or refuse are shipped in interstate commerce for commercial uses like animal feed, construction, recycling or the production of power,[6] we agree with the New Jersey Supreme Court that garbage and other objects intrinsically harmful are not objects in commerce. *Bowman* v. *Chicago & Northwestern Railway Co.,* 125 U.S. 465, 489 (1888); *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 525 (1935); *Sligh* v. *Kirkwood,* 237 U.S. 52, 59-60 (1915).

Here it is not the intrinsic threat posed by garbage and refuse but the threat to the life expectancy of sanitary

[5] 348 A.2d at 516.
[6] 348 A.2d at 513.

landfills that is at issue. Accordingly, the true article in commerce is not the garbage itself but the yet-unfilled real estate suitable for garbage disposal within the state.

The landfill potential of a state is a resource, just as water, oil, coal or any other commodity is a resource. If garbage were intrinsically ambient or flowing, like air or water pollution, no one would suggest that it is an article in commerce any more than sewage or industrial smoke are so considered.

In terms of transactional analysis this case deals not with the issue of garbage as an article in commerce but with the power of New Jersey to prevent haulers of garbage and refuse from purchasing land use rights in New Jersey for the purpose of disposing of garbage and refuse originating outside the State.

If the resource at issue is the remaining open and available landfill space, the question before this Court at first blush is not unlike the question of the right of a state to limit the export of other resources, such as water,[7] natural gas[8] or other commodities.[9] But the resource of available land for solid waste disposal should not be viewed as simply another state product. The amici do not contend that land sites cannot be articles in commerce[10] or that the Supreme Court has given the states blanket authority to control the export of resources. We do assert that the resource of open and available landfill space is so closely related to the provision of necessary government services that the Commerce Clause analysis is inapplicable.

[7] *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349 (1908); but see *City of Altus* v. *Carr,* 255 F.Supp. 828 (W.D. Tex. 1966) *aff'd per curiam* 385 U.S. 35 (1966).
[8] *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911).
[9] *Toomer* v. *Witsell,* 334 U.S. 385 (1948).
[10] See Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 *et seq.* (1968).

In any event there is ample reason to sustain the New Jersey enactment, even conceding *arguendo* that a balancing test like that in *Huron Portland Cement Co., supra,* is to be applied.

II. The Regulation of Solid Waste Facilities Is an Essential Governmental Function Within the Sovereign Powers of the States.

The amici assert that the maintenance of solid waste disposal facilities within a state is so essential to the maintenance of an ordered, healthful and pleasing environment that the operation or strict regulation of sanitary landfills has become much more an essential governmental service than an article in commerce. Commercial resources are generally found within a state because of nature (e.g., minerals or timber) or because of historical development (e.g., dairy products or manufactured goods). Solid waste disposal inexorably accompanies civilization and has always been a natural and necessary concern of government.[11] The point is not that the need to dispose of waste is more "vital" or "essential" to life than milk,[12] water [13] or natural gas.[14] Rather, it is the fact that solid waste disposal touches on so many aspects of governmental concern (e.g., regional planning, zoning, aesthetics, health and

[11] The Supreme Court of Michigan was guilty of only small hyperbole when it said:

> "The gathering of garbage is not a trade, business or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health." *City of Grand Rapids* v. *DeVries,* 82 N.W. 269, 273 (Mich. 1900). See "Solid Waste Disposal by Means of Sanitary Landfill", 36 Albany Law R. 632 (1972).

[12] *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511 (1935).

[13] *Hudson County Water Co.* v. *McCarter, supra,* note 7.

[14] *West* v. *Kansas Natural Gas Co., supra,* note 8.

environmental standards) which are susceptible to solution by social consensus and not by individual prerogative, that finds solid waste disposal essentially and necessarily associated with, and frequently a part of, state or local government. *Montgomery* v. *City of Galva,* 41 Ill. 2d 562, 244 N.E.2d 193 (1969); *Jansen Farms* v. *City of Indianapolis,* 202 Ind. 138, 171 N.E. 199 (1930); *City of Hobbs* v. *Chesport, Ltd.,* 76 N.M. 609, 417 P.2d 210 (1966); *Tayloe* v. *City of Wahpeton,* 62 N.W.2d 31 (N.D. 1953); *Boulevard Apartments, Inc.* v. *Mayor and Council of Borough of Lodi,* 110 N.J. Super. 406, 265 A.2d 838 (1970); 7 McQuillin, Municipal Corps. §§ 24.245, 24.253 (1968).

Perhaps the closest analogy to the present facts is presented by the attempt of some states to limit the export of water. See, e.g., Wyo. Stat. § 41-10.5 (Supp. 1974); "'It's Our Water!' — Can Wyoming Constitutionally Prohibit the Exportation of State Waters?", 10 Land and Water Law Review 119 (1975) (hereafter "Land and Water"); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349 (1908); but see *City of Altus* v. *Carr,* 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam,* 385 U.S. 35 (1966). Whether or not *Altus* v. *Carr* has effectively overruled *Hudson County Water Co.* v. *McCarter,* water has been generally regarded as in a special category, compared to other natural resources. *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229, 258-260 (1911). And the Supreme Court has generally refrained from deciding conflicting claims to water rights by states based on property theories. See Trelease, "Government Ownership and Trusteeship of Water," 45 Cal. L. Rev. 638, 651 (1957).

If water is unique, so is land. Water resources are renewable; a landfill is not. If some states are more favorably endowed with usable water than other states, the same cannot be said of land. The states each face the

limits of their own size, but no state is uniquely endowed with the "resource" of suitability for garbage dumping.

Water is ambient and can flow through many states, giving rise to conflicts among upper and lower riparian states and states separated by rivers. *Kansas* v. *Colorado,* 206 U.S. 46, 98 (1907); *Wyoming* v. *Colorado,* 259 U.S. 419, 465, 470 (1922). Water is apportioned among competing states, not in the market-place, not by the laws of supply and demand, but under principles of equitable apportionment among the states in interest as quasi-sovereigns. *New Jersey* v. *New York,* 283 U.S. 336, 342-343 (1931); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931). Land is of course fixed in location and is by law and long history subject to local, rather than national, controls. Therefore, the quasi-sovereign interest of the states in their own land and the quality of life on that land should be even farther from doubt.

The Appellants in this case argue the importance of solid waste disposal to the very existence of society even more vociferously than New Jersey or the amici. The exercise of the police power is based upon at least two theories. The first is that poorly maintained landfills will result in a threat to health or that the lack of adequate provision for solid waste is itself a threat to health (*Balch* v. *City of Utica,* 42 App. Div. 562, 59 N.Y.S. 513 (1899), particularly in a high consumption economy not yet geared up for reuse or recycling of its resources in any significant degree. The second is that in providing sufficient total area to meet landfill needs, other amenities, like aesthetic values, are sacrificed. See, e.g., *Town of Oronoco* v. *City of Rochester,* 293 Minn. 468, 471, 197 N.W.2d 426 (1972); Cf. *Parkersburg Builders Material Co.* v. *Barrack,* 118 W.Va. 608, 191 S.E. 368, 192 S.E. 291 (1937).

Unlike water, gas and electricity, which may come from sources distant from the end-users, solid waste disposal is a problem that emanates from human habitation and is

necessarily solved, if at all, locally. Not only are solid waste disposal facilities as essential as electricity, fuel, water, hospitals, schools and police facilities,[15] but such facilities are necessarily a part of the amenities state or local governments provide directly or regulate closely.

If the City of Philadelphia sought to place a municipally owned sewage disposal plant in New Jersey, absent consent or an interstate compact, there would be little hesitation in declaring that it lacked the power to do so. The power of eminent domain is never extraterritorial. *Georgia* v. *City of Chattanooga,* 264 U.S. 472 (1924); *County Court of Wayne County* v. *Louisa & Fort Gay Bridge Co., Inc.,* 46 F. Supp. 1 (S.D.W.Va. 1942).

A state and its municipalities also bear other necessary and natural consequences of human habitation and civilization. Each state and its communities need provide residence-related service to residents, such as public schools, fire and police services and welfare.

Sanitary landfills need not be owned by the State or a municipality in order for the same principles to apply. Whether or not landfills are government owned, they are closely controlled and supervised by government and are indistinguishable from other essential government services. If, under proper enabling law, the state or a municipality desires, it can exercise the power of eminent domain to acquire a landfill site.[16] The real question is whether a state through ownership and operation or through regulation has a substantial interest in the number and rate of use of sanitary landfills.

If the close and necessary relationship of solid waste disposal to government is recognized, New Jersey is no

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[15] They are often considered together. See, e.g., *Cassidy* v. *City of Bowling Green,* 368 S.W.2d 318, 320 (Ky. 1963).

[16] *N. Ward Co.* v. *Board of Street Com'rs of City of Boston,* 104 N.E. 965 (Mass. 1914) 217 Mass. 381; *Snavely* v. *City of Goldendale,* 10 Wash.2d 453, 117 P.2d 221 (1941).

more obligated to provide landfill space to serve the needs of local Pennsylvania governments and their citizens than it is to provide places for Pennsylvania pupils in their schools or police protection to Pennsylvania towns.

Given the universality of the solid waste problem and the limitations of space, the capacity to accommodate solid waste must be promoted everywhere, on the state, local and on the regional levels. Vermont has recognized the problem in its major environmental law, Act 250; 10 V.S.A. § 6086 (a)(9)(K) states:

> "(K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands."

While statutes in other states may not presently recognize the close relationship between solid waste disposal, land use and economic growth, the relationship is only reflected by Vermont law, not created by it.

To be strictly distinguished is the question of whether a state may prevent nonresidents from enjoying the bene-

fits of state citizens under the Privileges and Immunities Clause, *Toomer* v. *Witsell, supra,* note 9; *Mendiola* v. *Graham,* 139 Ore. 592, 10 P.2d 911 (1932); or whether non-residents can be subject to different standards or fees, *Landwehr* v. *Regents of Univ. of Colo.,* 156 Col. 1, 396 P.2d 451 (Colo. 1964); or whether residency itself may be discouraged by withholding state benefits to newcomers, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), or by restricting available habitat, *Construction Industry Association* v. *City of Petaluma,* 375 F. Supp. 574 (N.D. Cal. 1974), *reversed,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3473 (1976). Anyone is free to travel to New Jersey and, while there as a visitor or resident, to have the solid waste he generates accommodated in New Jersey.

The reasonable regulation of growth is now accepted as a proper land use planning tool. *Construction Industry Association* v. *City of Petaluma, supra; Golden* v. *Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 285 N.E.2d 291, *appeal dismissed,* 409 U.S. 1003 (1972); Cf. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974).

It begs the question for the Appellants to argue that their contribution to the solid waste stream in New Jersey will aid the profitability of sanitary landfill operations. (Appellants' brief, p. 20-21, 70-71). The interests of the landfill operators and the State (or its towns) are not necessarily the same. More rapid filling of landfills than planned may mean short-run profits for the operators and long-term costs for the communities that prematurely will require alternative sites for solid waste disposal or will have to curtail or alter planning for growth.

The public policy implications of the Appellants' arguments are fearsome. It may be impermissible for New Jersey to use the accident of natural bounty or industrial development to convey discriminatory economic benefit to her citizens. But it does not follow that New Jersey's

policies for land use, economic growth, environmental control, and aesthetics may be dictated by states that may be less willing to confront the consequences of their own growth policies and which seek a greater ratable share of potential regional growth by exporting the external consequences of growth and industrialization.

In short, the solid waste disposal resources of a state are so closely related to the functioning of state and local government as to preclude their consideration as the subject of interstate commerce.

III. Even Under Commerce Clause Analysis, the New Jersey Statute Should Be Upheld.

(a) *Solid Waste Disposal Is a Legitimate Subject of Local Concern.*

Water and available land for solid waste disposal are subjects of "local concern" not because they are resources located by happenstance in a particular place but because they are resources located everywhere and because the failure of local governments to maintain, promote and regulate these resources will limit both habitability and future economic growth. As one commentator argues:

> "No state is so devoid of water that its very economic livelihood must depend upon those surface or ground waters found wholly within the boundaries of a sister state. There is no justifiable reason which should require that sister state to sacrifice its future growth for the immediate growth of the requesting state." [17]

The argument should be applied even more cogently in the case of solid waste disposal. Technology and popula-

[17] "Land and Water", *supra*, at page 127.

tion growth leave twentieth century man dwelling increasingly astride and occasionally atop the rubble of his own consumption. No valid public policy is promoted if localities are permitted or encouraged to export their waste and postpone the time when the consequences of solid waste will have to be faced. No state Supreme Court has articulated the duty of each locality to face its own future growth needs better than the Pennsylvania Court. *National Land and Investment Company* v. *Kohn*, 419 Pa. 504, 215 A.2d 597, 610 (1965).

There is much argument by the Appellants that New Jersey's "local concern" position discourages regional solutions to solid waste disposal. The image of each separate state clutching its own resources and thwarting the notion of national union is touching but misplaced.

Undoubtedly regional cooperation is essential in solving solid waste problems. Solutions often fail to honor political boundaries. See, e.g., "Interstate Urban Areas and Interstate 'Agreements' and 'Compacts': Unclear Possibilities," 58 Geo. L. Rev. 799 (1970); "Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects," 4 Ecology Law Quarterly 63 (1974). It is ironic that the Appellants regard the absolute right to use the public or quasi-public resources of a sister state as favoring interstate cooperation in solid waste management. There is little incentive to interstate agreements if states can effectively achieve the desired results through the assertion of extraterritorial powers. Indeed one wonders why interstate solid waste or sewage compacts[18] as well as other pollution compacts[19] are necessary if the argument of Phila-

[18] Ohio River Valley Water Sanitation Compact (ORSANCO), 54 Stat. 752 (1940).

[19] E.g., Tennessee River Basin Water Pollution Control Compact, 72 Stat. 823 (1958). Interstate planning may be a prerequisite to receipt of federal grants for solid waste disposal facilities. 42 U.S.C. §3254b(c)(1)(A) (1973).

delphia in this matter is sustained. See the New Hampshire-Vermont Interstate Sewage and Waste Disposal Facilities Compact, Vermont Public Acts, 1975 No. 116; NH RSA 252-B (supp).

The only essential difference between sewage and solid waste physically is that solid waste does not flow and is generally shipped for disposal by vehicle. Both are major pollution problems and both have aroused the serious concern of both the states and Congress. If New Hampshire could have argued that sewage tanked or piped into Vermont was an article in commerce, one may fairly wonder if the Compact would have been deemed necessary.

The New Hampshire solid waste importation statute, NH RSA 147:30-e, *et seq.* (supp), provides an express recognition of the fact that regional interstate cooperation is necessary. While prohibiting the disposal of extraterritorial-source solid waste in New Hampshire, the statute exempts from that prohibition waste disposed of at a public disposal facility if it originates in an out-of-state municipality that is a member of a New Hampshire regional refuse disposal district, or that has arranged with the host municipality to share public disposal facilities.[20]

(b) *Garbage Transported For Disposal Is Not An Article In Interstate Commerce*

The Appellants have placed the weight of their argument on the proposition that wastes are the recognized subject of interstate commerce. They conceptually combine

[20] NH RSA 147:30-g Exemption. Nothing in RSA 147:30-f shall be construed to prohibit the disposal of out-of-state garbage, manure, putrescible materials or refuse at a public disposal facility provided the out-of-state city or town of origin is a participating member of a New Hampshire regional refuse disposal district as provided in RSA 53-B, or has arranged to share public disposal facilities with a New Hampshire city or town.

"solid and liquid waste" and "The process of collecting, transporting, treating and disposing of same . . ." as jointly the "subject" of interstate commerce.[21] But the services component is truncated. There is no credible argument (and none is made) that the New Jersey law discriminates against the collection and disposal of garbage by non-resident businesses. The New Jersey Act does not bar the performance of services by out-of-state companies, nor does its statute in practice prevent Pennsylvania companies from operating profitably in New Jersey.[22]

The far greater weight of Appellants' argument under the Commerce Clause is based on the assertion that garbage and refuse are articles in interstate commerce. This is apparent from the Appellants' treatment of the issue of evenhandedness (Appellants' brief, p. 29 *et seq.*). The Appellants appear to argue, with not inconsiderable pride, the high quality of out-of-state garbage, as if the real intent of the New Jersey enactment were to protect the reputation of the homegrown product.

Even assuming, *arguendo*, that garbage is an article in interstate commerce (rather than analyzing whether New Jersey has a constitutional right to conserve for its use the space available in the State for solid waste disposal) it is not true that the courts must weigh the value of garbage in interstate commerce as heavily as the value of other things when the competing factor is the public health, safety and welfare. Where a state statute has only an incidental effect on interstate commerce and the nature of the local interest requires protection, the Court may resolve the conflict in favor of the enactment. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142-144 (1970); *Southern*

[21] Appellants' brief, p. 17.

[22] The Appellants are New Jersey, not Pennsylvania, corporations.

Pacific Co. v. *Arizona,* 325 U.S. 761, 770-771 (1945); *Geer* v. *Connecticut,* 161 U.S. 519 (1896); *Sligh* v. *Kirkwood,* 237 U.S. 52 (1915). See Note, "The Constitution and State Control of Natural Resources," 64 Harv. L. Rev. 642, 647 (footnote 43) (1951).

(c) *The New Jersey Statute Does Not Favor Local Commercial Interests*

The focal issue, assuming the relevance of the Appellants' Commerce Clause approach is whether the New Jersey statute discriminates against interstate commerce. The touchstone is that a local commercial interest must be favored for the law to be discriminatory. *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951); *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511 (1935); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970); *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949).

The corporate Appellants are New Jersey corporations rather than foreign corporations (Appellants' brief, p. 19). In any case the practical effect of the New Jersey law is not discriminatory. Out-of-state haulers are free to compete with New Jersey haulers. Since the principal commodity in commerce is the right to fill up New Jersey landfill space, Pennsylvania or New Jersey operators can come into the State to compete on the same basis as local haulers. Pennsylvania garbage haulers may complain that the need to travel to New Jersey to conduct business puts them at a competitive disadvantage, and this is true. Similarly, Pennsylvania construction companies bidding on highway construction jobs in New Jersey face the costs, both initial and ongoing, of operating at a greater distance from home than local bidders. The answer is that the cost difference is not the result of an effort to "protect local industry", *Dean Milk* v. *City of Madison,* 340 U.S. 349,

354 (1951) but a consequence of where the work is done. New Jersey inhabitants produce sewage and solid waste in New Jersey rather than elsewhere. The disposal of this waste is a problem which must be solved by local and state government. The practical effect as well as the statutory intent of the New Jersey law is to promote the maintenance of essential municipal life services at the local level by conserving effective and safe landfills which reach their capacities within predictable time frames. Allowing for rational planning and allocation of future alternatives is a fact of twentieth century life and not a facially neutral form of words artfully devised to solve a problem in a manner calculated to favor local business interests.

By comparison the Supreme Court cases striking down the state laws discriminating against interstate commerce all evidence a purpose to favor local interests where that purpose was not in the slightest the necessary result of the nature of the problem giving rise to the legislation. *Dean Milk Co., supra,* ("Health measure" prohibited the sale of milk not pasteurized and bottled within five miles of City of Madison); *Pike* v. *Bruce Church, Inc., supra* (Arizona statute prohibited transportation of uncrated cantaloupes outside the state for packaging and processing).

Closer to the subject matter of the New Jersey statute on its facts is *Alexandria Scrap Corporation* v. *Hughes,* 391 F.Supp. 46 (D.Md. 1975). There a three-judge court struck down that part of an overall statutory plan to deal with abandoned vehicles which limited statutory protection from claims of owners to scrap processors with a plant physically located in Maryland. The statutory indemnity bore no necessary relationship to the nature of the scrap processing business, since the purposes of the law were the removal of abandoned vehicles and the encouragement of recycling or reprocessing the resultant scrap. The end

product in commerce was processed scrap, and the legislation was a plain effort to favor Maryland plants by limiting liability arising out of their operations. There was no logical or necessary relationship between the preference for in-state processors and the successful management of the abandoned vehicles problem. And to the extent optimal competition was thwarted, the problem was dealt with less efficiently and discriminatorily under the scheme.

It is evident that the principal—the only—purpose of the New Jersey legislation is not to boost the local carting business but to preserve available landfill space for contiguous inhabited areas. There are no "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests. . . ." *Dean Milk Co., supra,* 340 U.S. at 354; and *Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142.

Distinguishable are cases like *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923) and *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911). These cases explicitly deal with the attempt by one state to "regulate the interstate business to the advantage of the local consumers." (262 U.S. at 598). Or as said in *Kansas Natural Gas:*

> "In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of these products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State." (221 U.S. at 255.)

Kansas Natural Gas and *Pennsylvania* v. *West Virginia* are not essentially different from any of the cases dealing with economic discrimination by one state against the citizens of another.

When dealing with those cases in which a state purports to be "conserving" articles in commerce—and natural gas, water, fish, timber and coal are perhaps the essence of the category—the general rule, or at least the trend of the cases, is that if the commodity is scarce, the scarcity as well as the commodity are to be shared according to the dictates of the interstate marketplace and not the will of the legislature in which the commodity originates.[23] We have no quarrel with this rule. It simply does not apply where the actual commodity is land of no especial quality or endowment which is being transformed into a landfill, a function of state ownership or regulation through the exercise of state police powers.

The Appellants spend many pages in the context of cases in which local police power statutes are upheld *vel non* if they have only incidental impact on interstate commerce if they are applied evenhandedly. *Huron Portland Cement Co.* v. *Detroit, supra,* and the additional citations on p. 38 of the Appellants' brief. It is axiomatic that the New Jersey statute discriminates between New Jersey-source garbage and refuse and the out-of-state product. The question is, given the nature of the waste control problem and its close and necessary relationship to the functioning of State and local government, whether New Jersey has the right to take state-regulated landfills out of commerce altogether. This question is not addressed by the Appellants.

Their brief cites *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928). The Court in that case recognized that one means of avoiding discrimination in interstate commerce is to have the state retain the subject in controversy solely for state use and thereby not favor local producers who would then be barred along with out-of-state producers from shipping in interstate commerce. The court there said:

---

[23] *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923).

"* * * As the representative of its people, the state might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants . . . ." (278 U.S. at 13).

While we would not argue the present day force of *Foster* to goods customarily sold in interstate commerce, the language of the Court makes great sense where the subject matter—here, a state's available landfill resources—is closely related to the necessary functions of government and where government control or ownership is not imposed simply to lend credibility to discrimination against interstate commerce.[24]

The Appellants focus on the real issue in this case on p. 59 of their brief, but only in a hypothetical context:

> "Even if the New Jersey Supreme Court was correct in finding that the preservation of land represented a legitimate local purpose. [sic]
>
> '. . . extending the lifespan of existing landfills and thereby preserving further acreage from use

[24] Compare *Toomer* v. *Witsell*, 334 U.S. 385, 401 where the Court said, "To put the claim of the State upon title is to lean upon a slender reed . . ." quoting from *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920). There is no discrimination in favor of local businesses in the present case; the Appellants *include* local businesses, and the City of Philadelphia asserts that its contribution to New Jersey sanitary landfills may in some instances be essential to their survival. Appellants' brief, page *20*.

> as disposal sites is a legitimate and valid exercise of the police power of the State.'
>
> *Hackensack Meadowlands* v. *Mun. Landfill Auth.*, 68 N.J., *supra*, at 472.
>
> then there was still no basis to prohibit (a) entry, and (b) other authorized and regulated forms of disposal, including resource recovery and incineration."

Given that the New Jersey Supreme Court was correct in finding that land preservation is a legitimate local purpose, a proposition which today is beyond doubt, the New Jersey statute could then be overturned only if it was unreasonable in relation to its purpose. Not since the nineteen thirties has the Supreme Court invoked the doctrine of substantive due process to sit as a super-legislature in judgment of state statutes. And without conceding for a moment that any alternatives are realistically possible to the State of New Jersey in seeking to promote the orderly development and use of its land for solid waste disposal, the Appellants do not suggest any. Rather they attack the statute's exception for garbage to be fed to swine (Appellants' brief, p. 59); assert their interested judgment that out-of-state garbage would be a good thing for New Jersey sanitary landfills (Appellants' brief, p. 63), the uniform quality of solid waste originating inside and outside of New Jersey (Appellants' brief, pp. 64-65), and finally the conclusion that "the legitimate local interests of the State have already been protected, without exclusion, by the adoption of state administrative regulations applicable alike to intrastate commerce and interstate commerce." (Appellants' brief, p. 68).

Having assumed *arguendo* that the New Jersey Supreme Court was correct in finding that preservation of land

represented a legitimate local purpose, the fact that all sanitary landfills in New Jersey will be maintained in healthful condition does not overcome the strong presumption in favor of a state enactment. If it is legitimate for a State in the process of planning for land use, for public investment, for rational economic growth and for the preservation of aesthetic values to limit the number of sanitary landfills to a number which would be reasonably related to the foreseeable needs of the people of the state (or the region under appropriate interstate compact or governing federal law), it is no answer to the imposition of a limit that the sanitary landfills in excess of those required and planned for by the State will all be models of hygiene.

Conclusion

For the reasons set forth herein, the States of Vermont and New Hampshire urge that the decision of the Supreme Court of New Jersey be upheld.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

SUPPLEMENTAL BRIEF OF APPELLANTS.

ARGUMENT.

A. Congress Has Found That Solid and Liquid Waste Can Be Disposed of in Sanitary Landfills Without Posing a Danger to Public Health or to Environmental Quality.

On October 21, 1976, the President signed the Resource Conservation and Recovery Act of 1976, Pub. Law

94-580, 42 *U. S. C.* § 6901 *et seq.* Said Act contains a positive Congressional recognition that solid waste is in interstate commerce,[1] 42 *U. S. C.* § 6943(2), and can be disposed of upon land without posing a danger to either public health or environmental quality, 42 *U. S. C.* §§ 6902(3), 6944 and 6945.

The Administrator of the United States Environmental Protection Agency is directed to establish criteria for determining which facilities may be classified as sanitary landfills, and which will be classified as open dumps. The criteria must, at a minimum, eliminate any reasonable chance of adverse effects on health or the environment from land disposal:

> "Not later than one year after the date of enactment of this section, . . . the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps. . . . At a minimum, such criteria shall provide that *a facility may be classified as a sanitary landfill* and not an open dump *only if there is no reasonable probability of adverse effects on health or the environment from disposal* of solid waste at such facility."
>
> 42 *U. S. C.* § 6944 (Emphasis added).

1. The House Report observes:

". . . it is clear that most of our discarded materials have at some time entered the flow of interstate commerce (if not as waste itself, then in the form of products which will at some future time constitute waste).

"The fact that waste itself is in interstate and intermunicipal commerce has raised a number of problems. (Generally, hazardous waste is more likely to be the subject of interstate transportation than is non-hazardous industrial or municipal waste)."

House Report No. 94-1491 accompanying H. R. 14496 (Comm. on Interstate and Foreign Commerce), at 9-10.

Sanitary landfills are not treated as a mere alternative to other forms of disposal; they are viewed as the principal disposal source. In describing the most effective approach for dealing with discarded materials, the Committee on Interstate and Foreign Commerce, United States House of Representatives, commented:

> "The Committee recognizes that the most effective approach for alleviating the problems created by discarded materials is a comprehensive discarded materials management approach. Such an approach includes the use of techniques to recover the greatest amount of energy and materials possible from the discarded materials, reduce waste residuals to a minimum, and *provide for an environmentally sound disposal of the remainder, principally through sanitary landfill.*" [2]

Congress was familiar with the problems typically associated with land disposal. It recognized that the improper disposal of wastes may present a danger to public health and environmental quality, 42 *U. S. C.* § 6901 (b)(2), but it also understood that "the effects on human health and the environment from real sanitary landfill should be slight"; [3] a conclusion also reached by the New Jersey Department of Environmental Protection (A109, 155, 158).

Curiously, on October 7, 1976, just two weeks before the President signed the Resource Recovery and Conservation Act of 1976, the Governor of New Jersey approved a supplement to the Solid Waste Management Act governing hazardous and chemical wastes, bulk liquids and pesticides, *P. L.* 1976, *c.* 99. Pursuant to Sec-

2. Id., at 32 (Emphasis added).

3. Id., at 37

tion 5 of said Act, after March 15, 1980, a solid waste facility may accept or receive for disposal hazardous waste, chemical waste, bulk liquid or pesticide if ". . . such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department [of environmental protection] for the entire system". This represents an implicit legislative acknowledgment that properly regulated disposal does not pose a material threat to health or to the environment.

Appellees' attempted characterization of sanitary landfills as inherently or unavoidably dangerous to public health or the environment not only conflicts with the findings of state and federal government and with the record in this case, but also grossly distorts the true relationship between sanitary landfills and the environment.

Both within the industry and the government agencies charged with responsibility for solid waste programs, the environmental soundness of sanitary landfill disposal is an accepted fact. In a 1973 position paper on sanitary landfills, the U. S. Environmental Protection Agency's Office of Solid Waste Management Programs succinctly stated that "the sanitary landfilling process is the most economically feasible, acceptable method of solid waste disposal . . . . Under proper operation, *a sanitary landfill is aesthetically acceptable and free from public health and safety hazards.*"[4] This position has repeatedly been espoused by the EPA, and is expressly adopted in the EPA's 1974 Guidelines on Thermal Processing and Land Disposal of Solid Waste, wherein it is stated that "Sanitary landfilling is the most widely applied *environmentally*

4. *EPA Position Paper on Sanitary Landfills,* at 1, Office of Solid Waste Management Progams, U. S. Environmental Protection Agency (April 1973).

acceptable land disposal method."[5] And, in a publication released in 1976, the EPA's Solid Waste Management Programs Office once again acknowledged that "every community needs access to a sanitary landfill for environmentally safe disposal of its solid wastes."[6]

The EPA's official recognition of the environmental soundness of properly operated sanitary landfills accurately reflects the current thinking of knowledgeable observers of the solid waste industry. As one commentator has stated:

> "[T]hroughout this country, sanitary landfills will be *the* major mode of acceptable disposal for our commercial, industrial, chemical, waste water, and pollution control wastes, as well as resources recovery and energy conversion residues . . . . [R]esponsible disposal to land [is] the only potentially safe sink remaining for the disposal of our otherwise unrecovered residues."[7]

The aforementioned references are intended only to represent a small sampling of the exhaustive government and private literature pointing out the environmental compatibility of sanitary landfills.[8] What this sampling amply

5. *Thermal Processing and Land Disposal of Solid Waste—Guidelines,* U. S. Environmental Protection Agency, 39 Fed. Reg. 29334 (Aug. 14, 1974).

6. *Decision-Makers Guide in Solid Waste Management, at* 109 Office of Solid Waste Maagement Programs, U. S. Environmental Protection Agency (1976).

7. P. Vardy, "Land Disposal: 1975 to 1990—A Look Ahead at Changes in Technology, Gas and Leachate Controls and End Use Application", at 34, contained in *Compilation of Papers From Third National Congress: Waste Management Technology and Resource Recovery, National Solid Wastes Management Association* (1975).

8. See, *e.g., The Environmental Management of Leachate,* NSWMA Technical Bulletin (Oct. 1974), at 1 ("The application of sound and rigid engineering principles and construction practices

illustrates, however, is that Appellees have tried to circumvent the consensus of informed private and governmental opinion on the relationship of sanitary landfills to the environment.

Congress has acted to promote the protection of health and the environment by "prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health". 42 *U. S. C.* § 6902(3); see also 42 *U. S. C.* § 6945. That being the case, there is no reasonable basis for New Jersey to prohibit the disposal therein of solid or liquid waste which originates outside the state.

B. *P. L.* 1973, *c.* 363 Prohibits the Entry Into New Jersey of Solid Waste for Purposes of Resource Recovery and Energy Conservation.

The Resource Conservation and Recovery Act of 1976 contains a Congressional finding that usable materials and energy[9] may be recovered from solid waste. Since "the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments", 42

8. (Cont'd.)
continues to demonstrate that sanitary landfilling is not only an acceptable and economic method of solid wastes disposal, but also an excellent way to convert unused, unsuitable, or marginally acceptable land into valuable real estate for a variety of community end uses."); Weddle and Garland, "Dumps: A Potential Threat to Our Groundwater Supplies", *Nation's Cities* at 24 (Oct. 1974) ("[S]anitary landfilling [is] the only proven, environmentally acceptable method of final disposal available."); Garland and Mosher, "Leachate Effects of Improper Land Disposal", *Waste Age* (March 1975).

9. It is undisputed that methane gas recovered at sanitary landfills may be processed into natural gas and fed into the commercial gas system (A277). Thus, sanitary landfills themselves may provide a source of energy.

U. S. C. 6901(c)(3), recovered material must have a very considerable value.

In their briefs and at oral argument, Appellants stressed that usable materials and energy are excluded from New Jersey by *P. L.* 1973, *c.* 363. They identified automobile hulks as one of the many examples of solid waste subject to the ban. Appellees disagreed, pointing to the emergency rule, *N. J. A. C.* 7:1-4, adopted by the Department of Environmental Protection (A92).

All parties implicitly agree that automobile hulks may be processed and valuable usable materials recovered therefrom. It is also common knowledge, and this Court may take judicial notice, that such hulks contain steel, aluminum, copper, cloth, glass, plastic, tin, rubber, cardboard, and other similar substances too numerous to mention.

An automobile hulk cannot be defined as "separated waste material" (A96) within the meaning of *N. J. A. C.* 7:1-4.2(b), or "municipal solid waste" (A96) as contemplated by *N. J. A. C.* 7:1-4.2(c). Therefore, automobile hulks are plainly still subject to the entry ban.

A second, and far broader, example of excluded recoverable waste is illustrated in *N. J. A. C.* 7:1-4.2(c), which permits importation of only:

> "Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70% of the thru-put of any such facility is to be separated or processed into usable secondary materials."

If municipal solid waste has value as a potential source of fuel or other usable secondary materials, then so must commercial, industrial and agricultural waste. But these

latter wastes remain subject to the entry ban, except to the limited extent that they fall into another excepted category (A96).[10]

One objective of the Resource Conservation and Recovery Act of 1976 is the establishment of ". . . a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste." 42 *U. S. C.* § 6902(8). That objective cannot be achieved if states remain free to adopt exclusionary legislation.

C. A Statute Which Prohibits the Entry or Disposal in One State of Solid Waste Which Originates in Another State Conflicts With the Resource Conservation and Recovery Act of 1976, or Plainly and Palpably Infringes Its Policy.

In adopting the Resource Conservation and Recovery Act of 1976, Congress recognized that contiguous areas in adjoining states may "have common solid waste management problems and are appropriate units for planning regional solid waste management services". 42 *U. S. C.* § 6942(a). A mechanism was established to facilitate the development of regional solid waste management plans for such areas.

Once identified by the Administrator of the U. S. Environmental Protection Agency, the Governors of the respective states are required to fix the boundaries of each interstate area and to establish or designate a body to

10. A state or regional solid waste plan adopted pursuant to the applicable provisions of the Resource Conservation and Recovery Act of 1976 ". . . shall provide that no local government within the State shall be prohibited under State or local law from entering into long-term contracts for the supply of solid waste to resource recovery facilities". 42 *U. S. C.* 6943(5). By its specific terms, *P. L.* 1973, *c.* 363, would frustrate this policy by preventing the acquisition of solid waste which originated in another state.

develop a regional plan therefor, 42 *U. S. C.* § 6946(c)(1) and (2). The Governors have no discretion in the matter. Congress has mandated that they "shall" take the designated action.

State laws which prohibit the interstate movement of solid and liquid waste are antithetical to the accomplishment of the expressed Congressional purpose. Regional plans cannot be developed if states prohibit the entry of solid waste originating in other states.

In *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, 766 (1945), this Court held:

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless . . . the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

Since solid and liquid waste can be disposed of without posing a danger to the environment or to health, a state statute which indiscriminately bans the entry of solid and liquid waste unquestionably stands as an obstacle to the accomplishment of national policy, and should be struck down.

CONCLUSION.

Based upon the aforesaid argument, and the arguments set forth in the Brief and Reply Brief of Appellants heretofore filed with this Court, it is respectfully urged, in order of preference, and in the alternative, (1) that the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional on the ground that same directly burdens and discriminates against interstate commerce; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

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CERTIFICATE OF SERVICE.

We hereby certify that on this 6th day of December, 1976, three copies of the Supplemental Brief of Appellants were mailed, with adequate first class postage prepaid: to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to William C. Brashares and Paul M. Laurenza, Cladouhos & Brashares, attorneys for *amicus curiae,* National Solid Wastes Management Association, at their law office located at 1750 New York Avenue, N.W., Washington, D. C. 20006; to Louis L. Meier Jr., attorney for *amicus curiae,* American Society of Civil Engineers, at his law office located at 1625 Eye Street, N.W., Washington, D. C. 20006; to David H. Souter, Attorney General, attorney for the State of New Hampshire, *amicus curiae,* at his office located in the State House Annex, Concord, New Hampshire 03301; and to M. Jerome Diamond, Attorney General, attorney for the State of Vermont, *amicus curiae,* at his office located in the Pavilion Office Building, Montpelier, Vermont, 05602.

We further certify that all parties required to be served have been served.

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IN THE

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OCTOBER TERM, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

SUPPLEMENTAL BRIEF FOR APPELLEES

Preliminary Statement

By order dated November 15, 1976, the Court granted the appellants' motion for leave to file a supplemental brief to consider the impact, if any, on this appeal of the enactment of the Resource Conservation and Recovery Act of 1976 (Pub. Law 94-580). The order further allowed each side twenty-one days within which to file such a brief.

ARGUMENT

The Resource Conservation and Recovery Act of 1976 does not pre-empt New Jersey's prohibition against the disposal of waste originating out of state, but rather supports the conclusion that waste disposal does not involve the national interest in the maintenance of an open economy which the Commerce Clause was designed to protect.

It is now well established that an intent to pre-empt state legislation should not be inferred unless there is "an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 147 (1963). The Court has been particularly reluctant to find an intent to pre-empt state legislation which has been enacted to serve environmental interests. *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973); *Huron Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). Therefore, the appellants must bear the heavy burden of demonstrating an unambiguous congressional mandate that the Resource Conservation and Recovery Act of 1976 (hereinafter "the Act") pre-empts New Jersey's statute prohibiting the disposal of waste originating out of state.

Preliminarily, note should be taken of the procedural route by which the appellants' pre-emption claim comes before the Court. Since the Act was not signed by the President until October 21, 1976, the state courts had no opportunity to consider its effect. Furthermore, there was no claim of pre-emption raised by the appellants either in their jurisdictional statement, initial brief on the merits or in oral argument. These circumstances ordinarily would bar the appellants from raising the claim at this late date. *Cardinale* v. *State of Louisiana,* 394 U.S. 437 (1969). However, an exception to the ordinary practice is recognized where there has been a supervening change in the law which may obviate the need for the Court to reach the issue initially projected for review. *United States* v. *New Jersey State Lottery Commission,* 420 U.S. 371 (1975). Therefore, if it could be concluded that the Act on its face totally pre-empted the New Jersey legislation, it might be appropriate to dispose of the case on those grounds.

However, it is clear that the main sections of the Act have no operative effect at this time and that the contours of future federal regulation are contingent upon implementing administrative action, the form of which cannot now be predicted. Therefore, there is no substantial basis on which it can be argued that the Act on its face pre-empts or in any way undermines the validity of New Jersey's prohibition against the disposal within the State of waste originating out of state. On the contrary, the only sense in which the Act bears on this case is that it contains express congressional recognition of the principal premises on which defense of the validity of the New Jersey statute rests.

First, the Act contains an express congressional recognition of the fact that solid waste disposal is not a sub-

ject of ordinary commercial dealings controlled by the free market principles of the Commerce Clause but rather a subject which directly affects the environment and public health. Thus, section 1002(b) states that:

> "(b) ENVIRONMENT AND HEALTH.—The Congress finds with respect to the environment and health, that—
>
> "(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
>
> "(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
>
> "(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;
>
> "(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;
>
> "(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and
>
> "(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken; . . ."

Secondly, the Act constitutes an express congressional recognition that the problems of solid waste disposal are primarily of state and local, not national, concern. Thus, §1002(a)(4) states that ". . . the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." This point is underscored by the comments during deliberations on the bill on the floor of the Senate. The co-sponsor of the bill, Senator Randolph, stated:

> "In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.
>
> "This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.
>
> "Guidelines should provide the States and area planning agencies with maximum flexibility, while

assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.

"To assure that the Federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request." 122 Cong. Rec. 11069 (1976) (remarks of Senator Randolph).

These views were echoed by Senator Stafford of Vermont (Id. at 11071), Senator Baker of Tennessee (Id. at 11072) and Senator Dole of Kansas (Id. at 11094-11095). No contrary view was expressed. See also S. Rep. No. 94-988, 94th Cong., 2nd Sess. 11 (1976).

A review of the individual subsections of the Act also shows that its overall design was to foster the waste disposal programs of the states rather than to pre-empt the field at the federal level. The Act represents a significant new federal commitment to participate in solving the problems of solid waste collection and disposal. However, with limited exceptions discussed below, the Act does not purport to override state legislation dealing with the problems of solid waste management. The Act provides in §2003 for the establishment by the Administrator of the

Environmental Protection Agency (hereinafter "EPA") of "Resource Conservation and Recovery Panels", consisting of technical, marketing, financial and institutional specialists, which will have the responsibility of providing "States and local governments upon request with technical assistance on solid waste management, resource recovery and resource conservation." §2004 establishes a program of federal grants to assist private and public purchasers of tire shredders. §7007 authorizes federal grants to train State and local personnel to carry out solid waste and resource recovery programs. Federal funding of research and development and demonstration projects are authorized by §8001 and §8004. The sections are all elements of an overall congressional design to leave the responsibility for dealing with the problems of solid waste at the state and local level but at the same time to provide federal financial and technical assistance.

The one area in which the federal government has assumed a direct regulatory responsibility is with respect to hazardous waste. The Administrator of EPA has the responsibility under §3001 for identifying the characteristics of hazardous waste and listing particular hazardous wastes not later than eighteen months after enactment of the Act. The Administrator is required within the same period to promulgate regulations governing the generation, storage, transportation and disposal of hazardous waste. §3002-3005. The Administrator also may delegate the responsibility for regulation of hazardous wastes to state authorities. §3006.

Although the exact parameters of the eventual federal regulation of hazardous waste are difficult to predict at this time, it is clear that the assumption of federal regulatory control over the subject has no immediate impact upon New Jersey's prohibition against the disposal of

waste originating out-of-state and only a limited potential long range impact. First, these sections of the Act are not self-implementing but rather are dependent upon the promulgation by the Administrator of EPA of a list of hazardous wastes and of regulations governing their generation, storage, transportation and disposal. Since the Administrator has eighteen months within which to promulgate such lists and regulations, the federal regulation of this area probably will not become operative at all for nearly a year and a half. It is firmly established that such potential future regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714, 723-724 (1963); *Welch Co.* v. *New Hampshire,* 306 U.S. 79, 84-85 (1939).

Secondly, even when the federal regulatory program becomes operative, it will be limited to "hazardous wastes". This term is generally understood in the field of solid waste management to apply solely to industrial wastes which are inherently dangerous to plant and animal life. The Senate Committee on Public Works noted in its report on the Act that "[m]aterials of major concern are arsenic wastes, insecticide and pesticide residues, waste oil, explosive wastes, sludge contaminated with metals such as chromium and zinc, and radioactive wastes." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 3 (1976); see also 40 Fed. Reg. 42993 (1975); 1 U.S. Environmental Protection Agency, *Proceedings 1975 Public Meetings on Hazardous Waste Management* 8 (1976). In the Act, "hazardous waste" is defined as:

> ". . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—

> "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> "(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." §1004(5).

In addition, the Administrator is directed, in listing the "hazardous wastes" which will be subject to federal regulation, to take into account ". . . toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." §3001. It seems clear that ordinary household and commercial waste, or garbage, would not fall within these criteria for defining "hazardous waste" and thus would not be subject to federal regulation under §3001-3011 of the Act. This conclusion is confirmed by the Report of the Senate Committee on Public Works on the Act which expressly states that the permit system for hazardous wastes ". . . is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 94-988, 94th Cong., 2nd Sess., 16 (1976). Since the New Jersey statute as limited by its implementing regulations (App. 92-96) is primarily directed towards general municipal waste and the appellants apparently are engaged solely in the disposal of such waste, it would appear that the federal regulation of "hazardous waste" would have no effect upon the subject matter of this case even when that regulatory program becomes operative.

Finally, even as to "hazardous wastes", the Act indicates that state regulation may continue so long as it is

not "less stringent" than federal regulations. §3009. Since the eventual promulgation by the Administrator of regulations which would conflict with the prohibition against the disposal of waste originating out of state is a matter of pure conjecture, it is uncertain at this time whether there will be any conflict between the New Jersey statute and federal regulation even with respect to the limited area of "hazardous wastes". Therefore, the provisions of the Resource Conservation and Recovery Act of 1976 regarding "hazardous wastes" do not undercut the validity of the New Jersey statute.

In addition to providing for direct federal regulation of the subject of "hazardous waste", the Act also establishes a system of incentives for regional planning with respect to the reclamation or disposal of other solid wastes. The Act contemplates joint federal-state action, first, to identify regions appropriate for solid waste planning, and second, to adopt regulations for solid waste management in such regions. First, §4002(a) provides that within 180 days after enactment of the Act, the Administrator of EPA ". . . after consultation with appropriate Federal, State, and local authorities, shall by regulation publish guidelines for the identification of those areas which have common solid waste problems and are appropriate units for planning regional solid waste management services." §4006(a) provides that within 180 days after adoption of the federal guidelines, ". . . the Governor of each State, after consultation with local elected officials, shall promulgate regulations based on such guidelines identifying the boundaries of each area within the State which, as a result of urban concentrations, geographic conditions, markets, and other factors, is appropriate for carrying out regional solid waste management." §4006(c) also provides that such regions may embrace more than one State in which event ". . . the Governors of the

respective states . . . shall enter into agreements identifying the boundaries of such region." §4006(b) provides that within a third 180 day period the State shall ". . . (A) identify an agency to develop the State plan and identify one or more agencies to implement such plan, and (B) identify which solid waste functions will, under such State plan, be planned for and carried out by the State and which such functions will, under such State plan, be planned for and carried out by a regional or local authority or a combination of regional or local and State authorities." Second, with respect to the solid waste regions established under §4002(a) and §4006(a), (b) and (c), eighteen months after enactment of the Act, ". . . the Administrator shall, atfer consultation with appropriate Federal, State, and local authorities, promulgate regulations containing guidelines to assist in the development and implementation of State solid waste management plans." The Act does not contain any specific time period within which State solid waste management plans should be submitted, but it authorizes appropriations for solid waste planning and provides that a State must have a State plan which has been approved by the Administrator in order to be eligible for such federal financial assistance. §4007(b).

Although the exact future scope of federally supervised regional solid waste planning by state and local agencies, like the direct federal regulation of hazardous wastes, cannot be forecast with any assurance, it is clear that it has no immediate impact upon New Jersey prohibition against the disposal of waste originating out of state and that any long range effect upon the prohibition is purely conjectural. First, the regional planning provisions of the Act are not self-implementing but rather will become operative only after administrative action at both federal and state levels. The Administrator of EPA has

180 days after enactment of the Act to publish guidelines for identifying regional solid waste planning areas, and thereafter the Governors of the States have two further 180 day periods for identifying the boundaries of regional planning areas and the agencies to carry out such planning; there is thus an overall period of nearly eighteen months before regional planning areas and implementing agencies even will be identified. The Administrator of EPA has the same eighteen month period within which to promulgate guidelines for State solid waste management plans. Although the Act sets no deadline for the actual submission of regional plans, it must be assumed that some additional period will be required for this purpose beyond the eighteen months allowed for identifying planning regions and implementing agencies. Consequently, it will be several years before regional plans under the Act become operative. Therefore, assuming *arguendo* the possibility that New Jersey's prohibition against the disposal of waste originating out of state could conflict with such plans, such possible future action by a federal regulatory agency does not undermine the present validity of New Jersey's law. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, supra; Welch Co.* v. *New Hampshire, supra.*

Secondly, there is no express indication in the Act that a State is required to participate in the program of regional planning provided thereunder. Rather, it appears that the sole consequence of a failure to engage in such regional planning is the loss of federal financial assistance under this subsection of the Act. If this reading of the Act is correct, then it is a matter of conjecture whether New Jersey will even subject itself to these provisions of the Act.

Thirdly, assuming the federal scheme of supervision of regional planning becomes operative, the only way in

which there could be a conflict between the New Jersey statute and a regional plan under the Act is if the plans of New Jersey and its neighboring states include "interstate regions" pursuant to §4006(c). There is of course no way of knowing at this time whether the guidelines to be promulgated by the Administrator under §4002(a) will suggest the appropriateness of any interstate region encompassing New Jersey. Furthermore, the Act contemplates that the identification of interstate regions and planning agencies shall be by "agreement" between the Governors of the respective states. The essentially voluntary nature of such regional planning is confirmed by the numerous statements in the legislative history of a congressional intent that ". . . States and areawide solid waste management planning agencies have free choice in selecting the elements of their solid waste management plans. S. Rep. No. 94-988, 94th Cong., 2nd Sess., 11 (1976). See also 122 Cong. Rec. 11069 (1976) (comments of Senator Randolph); *Id.* at 11071 (comments of Senator Stafford); *Id.* at 11072 (comments of Senator Baker); *Id.* at 11094-11095 (comments of Senator Dole).* This point is stated with particular clarity in the Report of the House Commerce Committee:

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.

---

* One exception to the general design of local option with respect to state plans is the requirement that open dumps be eliminated. See §4005.

> "Simply, the discarded materials problem is one of planning and the Committee anticipates that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet very broad and flexible objectives of this act. If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning." H. Rep. No. 94-1491, at 33.

The extent to which "interstate agreements" might be reached pursuant to §4006(c) and the form they would take is therefore a matter of conjecture. Furthermore, even if the procedures of the Act eventually were to result in an agreement between the Governors of the respective states which was inconsistent with a total ban on the disposal in New Jersey of out-of-state waste, this would not result in an invalidation of the New Jersey statute. Rather, it would simply provide an appropriate occasion for a further exercise by the New Jersey Commissioner of Environmental Protection of his power to adopt exceptions from the total ban where that can be done ". . . without endangering the public health, safety and welfare. . . ." N.J.S.A. 13:1I-10.

In sum, the enactment of the Resource Conservation and Recovery Act of 1976 does not pre-empt or in any way undercut the validity of the New Jersey legislation prohibiting the disposal of waste originating out of state. Rather, it reflects congressional concurrence with the view that the disposal of waste does not involve the national interest in maintenance of an open economy which the

Commerce Clause was designed to protect, but instead the discharge by government under the police power of a fundamental responsibility to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use. Furthermore, recognition of the fact that a political subdivision of a state, such as the appellant City of Philadelphia, cannot invoke the negative implications of the Commerce Clause to force the State of New Jersey to dispose of its waste and to suffer the resulting environmental harms, does not mean that interstate approaches to solid waste management problems are inappropriate. Nor does it mean that Congress lacks the authority to compel the states under appropriate circumstances to deal with waste disposal problems on a regional or national basis. It simply recognizes that the problems of waste disposal, like the problems associated with the investigation and prosecution of crime, are governmental problems, rather than ordinary commercial transactions, and that regional approaches should be the product of agreement between the responsible state officials, or the mandate of Congress, and not an unplanned by-product of the whims of the marketplace. The Resource Conservation and Recovery Act of 1976 provides a congressional legislative framework for just such cooperative governmental arrangements by agreement between the states and, to a limited extent, by direct regulatory activity of the federal government. However, the main provisions of the Act will not become operative for several years and even when the Act does become fully effective, it is purely conjectural whether there would be any conflict between the administration of the Act and enforcement of the prohibition against the disposal within New Jersey of waste originating out of state. Therefore, the Act does not impair the facial validity of the New Jersey legislation.

CONCLUSION

It is respectfully submitted that for the reasons expressed in our principal brief on the merits and in this supplemental brief the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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